INDEX
TO
STATEMENT AS TO JURISDICTION

	Page
Statute Giving Jurisdiction	1
Section 237(a) Judicial Code (28 U. S. C. 344)	1
Date of Decree to be Reviewed	1
Date Application Presented	1
Statute Involved and Federal Questions Raised	1, 2
Constitutional Provisions	
Article 1, Section 10, Constitution of the United States	2, 12
Fourteenth Amendment, Same	3
Sec. 4, Art. XIII, West Virginia Constitution	2, 5
Article V and Sections 1, 3 and 12 of Article VIII, W. Va. Constitution	2
Section 5, Article XIII, W. Va. Constitution	5
Article 9, Ordinance of the Wheeling Convention or Assembly of the Restored Government of Virginia	6
W. Va. Constitution of 1862, Sec. 1, Art. 9	6
W. Va. Constitution of 1872, Sec. 1, Art. 13	6
Statutes	
Chapter 160, Acts of West Virginia Legislature, Regular Session 1947	2
Same—Section 12 thereof	2
Same—Section 33 thereof	4
Same—Section 28 thereof	5
Article 3, chapter 37 of Official Code of West Virginia of 1931	2
Chapter 95, Acts of West Virginia Legislature of 1882	2
Chapter 117, Acts of West Virginia Legislature of 1941 (Code, Chapter 11A)	2
Same—Article 4 thereof	2
Chapter 140, Acts of W. Va. Legislature of 1945	2
W. Va. Code, Chap. 11A, Art. 3, Sec. 8 (Acts of W. Va. Legislature of 1941, Chap. 117, Art. 3, Sec. 8)	3
Sec. 9, of Chapter 160, Acts of W. Va. Legislature of 1947	3

Page

Chapter 134, Acts of West Virginia Legislature, Regular Session of 1949 4
Chapter 36, Code of Virginia of 1860 7
Magna Carta, Paragraph 9 7

Cases

King v. *Mullins*, 171 U. S. 404, 18 S. Ct. 925, 43 L. Ed. 214 6
Sims v. *Fisher*, 125 W. Va. 512, 25 S. E. 2d 216 2
State v. *Farmers Coal Co.*, — W. Va. —, 43 S. E. 2d 625 ..... 2, 3
Same, Syllabus 3 by Court 3
Webb v. *Ritter*, 60 W. Va. 193, 54 S. E. 484 6
State v. *West Branch Lumber Co.* (1908), 66 W. Va. 1, 65 S. E. 1058 7

Nature of Case—When and How Federal Questions Raised and Ruled upon 9

Constitutional Provisions

Constitution of the United States, Art. 1, Sec. 10 11
Same—Fourteenth Amendment 12

Constitution of West Virginia:
Art. 3, Sec. 4 12
Art. 13, Sec. 1 6
Art. 3, Sec. 10 ..... 11, 12

Statutes

Chapter 160, Acts of W. Va. Legislature of 1947 12

Cases

Green v. *Biddle*, 8 Wheat. 1 13

Substantiality of Federal Questions 13
Cases Sustaining Jurisdiction 13

Cases

King v. *Mullins* (supra) 13
Green v. *Biddle*, 8 Wheat. 1 13
West Coast Hotel Co. v. *Parrish* (1937), 300 U. S. 379, 57 S. Ct. 578, 81 L. Ed. 703 13

BLEED THROUGH—POOR COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 326

JERRY M. GRAY, ET AL.,

Appellants,

vs.

THE STATE OF WEST VIRGINIA

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

STATEMENT AS TO JURISDICTION

The jurisdiction of the Supreme Court of the United States upon appeal is invoked under Section 237 (a) of the Judicial Code (28 U. S. C. 344). The final decision and order of the Supreme Court of Appeals of West Virginia was entered on the 8th day of March, 1949, with concurring opinion filed on the 29th day of March, 1949, and with petition for rehearing denied on the 25th day of April, 1949. Application for appeal is herewith presented on the 23rd day of July, 1949.

The statute of the State of West Virginia, the validity of which is involved is Chapter 160, Acts of the West Vir-

ginia Legislature, Regular Session 1947, relating to the State's title to lands claimed as forfeited for nonentry for taxation and delinquent for nonpayment of taxes and the State's sale and disposition of same. The legislative coverage of this subject had theretofore been Article 3, Chapter 37 of the Official Code of West Virginia of 1931 which was essentially a codification and reenactment of Chapter 95 of the Acts of the West Virginia Legislature of 1882. This Legislation was amended by Chapter 117, Acts of West Virginia Legislature of 1941 (referring itself to the Code as Chapter 11A), the purpose of which amendment, and particularly Article 4 thereof, was "to abolish the existing judicial proceeding for the sale of land for the school fund, and to substitute therefore an administrative ex parte proceeding", and constituted the circuit courts as administrative agencies for administration, but the Supreme Court of Appeals of West Virginia, in *Sims* v. ***Fisher***, 125 W. Va. 512, 25 S. E. 2d 216, held that this was repugnant to Sec. 4, Art. XIII of the West Virginia Constitution which requires that the proceeding "must be a judicial proceeding, requiring process or notice in advance of hearing" and "as a condition precedent . . . a judicial finding that the land proceeded against is, in fact, subject to sale", and further repugnant to Article V and Sections 1, 3 and 12 of Article VIII of the W. Va. Constitution relating to the division of powers and the jurisdiction of the courts. Then followed Chapter 140 of the Acts of the W. Va. Legislature of 1945 which the Supreme Court of Appeals of West Virginia, in *State* v. ***Farmers Coal Co.***, — W. Va. —, 43 S. E. 2d 625, held repugnant to Sec. 4, Art. XIII of the W. Va. Constitution because it sought to sell land still redeemable by the former owner. Then followed Chapter 160, Acts of 1947, here complained of.

The specific features of Chapter 160, Acts of 1947, here complained of as being in violation of Article I, Section 10

BLEED THROUGH—POOR COPY

of the Constitution of the United States, which prohibits state legislative enactments impairing the obligation of contracts, and the Fourteenth Amendment to the Constitution of the U. S., which prohibits a State from depriving any person of property without due process of law, consist of:

1. The right or equity of redemption attached to these defendants' respective properties by W. Va. Code, Chap. 11A, Art. 3, Sec. 8, Acts of W. Va. Legislature of 1941, Chap. 117, Art. 3, Sec. 8 permitted redemption "at any time until such real estate has been sold" by the State, but Sec. 9 of Chapter 160, Acts of 1947, cut short, took away and destroyed that right as of June 30, 1947, and this suit is based upon an extinguishment of that right and equity although Sec. 4, Art. XIII of the W. Va. Constitution as interpreted in *State* v. *Farmers Coal Co.* (1947) —W. Va. —, 43 S. E. 2d 625, Syllabus 3 by the Court is as follows:

> "Under the provisions of Section 8, of Article 3, Chapter 117, Acts of the Legislature 1941, lands returned delinquent for the nonpayment of taxes assessed thereon, sold by the sheriff, and purchased by the State, do not become irredeemable, within the meaning of Section 4, Article XIII of the Constitution of this State, at any time before the institution of the suit therein directed, and cannot be made the basis of such suit."

2. The legislative declaration of forfeiture of "absolute title" to all land claimed by the State as forfeited and delinquent and sale of same in violation of constitutional rights of the former owners.

As to the latter, the entire act, Chapter 160, is based upon such declared forfeiture. But the last paragraph of Section 12 specifically recites the legislative forfeiture and

denies the right of the former owner to notice and opportunity to be heard as follows:

> "In view of the fact that the state has absolute title to all forfeited land, to all land sold to the state for nonpayment of taxes and become irredeemable, to all escheated land, and to all waste and unappropriated land, and must under the constitution have such an absolute title before the land may be sold for the benefit of the school fund; and in view of the fact that the former owner of any such land, or any person claiming under him, has no further interest therein nor rights in respect thereto except such privilege of redemption as may be extended to him by the legislature as an act of grace; and in view of the further fact that all parties known and unknown who may claim an interest in any of the lands included in the suit are given notice thereof by the order of publication provided for above; therefore, the legislature deems it both expedient and necessary to provide that failure to name any such person as a defendant, or failure to serve the summons on any named defendant, shall in no wise affect the validity of any of the proceedings in the suit for the sale of the state's title to such land."

Furthermore, Section 33, forecloses the former owner by a conclusive presumption of title in the purchaser from the State, as follows:

> "The deed shall be conclusive evidence of the acquisition of such title. The title so acquired shall relate back to the date of the sale."

This legislative declaration of forfeiture and denial of the right to notice and opportunity to be heard have been reasserted and reaffirmed in unmistakable language in Chapter 134, Acts of West Virginia Legislature, Regular Session of 1949, for which see reference and quotations in concurring opinion filed herein by the Supreme Court of Appeals of West Virginia on March 29, 1949.

BLEED THROUGH—POOR COPY

In order that the rights of former owners, which are protected by the Federal Constitution against the provisions of Chapter 160, may readily appear, the following should be noted in addition to what has already been referred to:

1. Section 5, Article XIII of the W. Va. Constitution reserves to the former owner all the surplus from the State's sale after payment of the taxes, interest and costs, which right is even recognized in Section 28 of Chapter 160—as a result of which the State could never have "absolute title". This Section of the Constitution is construed in *Sims* v. *Fisher* (*supra*), as follows:

> "But we think this right in the former owner, being constitutional under Section 5, Article XIII, furnishes a basis for the claim that the former owner is entitled to have the land, out of which he may expect something from the surplus, sold under the most favorable conditions. The general rule, as is well known, is that real estate is not usually sold in a judicial proceeding until the liens thereon are first ascertained and decreed; and that is a rule that may well be applied in the sale of land for the benefit of the school fund, to the extent that all questions of the right to sell the land be settled in advance of sale. The absolute right of the State to lands as forfeited and delinquent is, we think, limited to this extent and so limited by the Constitution."

2. Section 4, Article XIII of the W. Va. Constitution requires, for the protection of the former owner, that the state sell through "a judicial proceeding" which of necessity includes the right to be made a party, to have notice including personal service on residents, to have an opportunity to be heard, to have a judicial finding that there was in fact a forfeiture and a vesting of the title in the State. This section of the Constitution was construed in *Sims* v. *Fisher* (*supra*):

> "Further, we are of the opinion that the proceeding in the circuit court for the sale of lands for the benefit of the school fund under Section 4 of Article XIII of the Constitution, must be a judicial proceeding; and that before sale of land may be ordered, there must be a judicial finding that the title to the land sought to be sold is, in fact, vested in the State, and therefore subject to sale."

The same case quotes and approves *Webb* v. *Ritter*, 60 W. Va. 193, 54 S. E. 484, which dealt with an older statute under the same constitutional provision in part as follows:

> "Therefore, neither the Constitution nor any statute attempts to declare an absolute and conclusive forfeiture except by the adjudication of a court after a full opportunity to be heard. This view of the forfeiture clause makes it absolutely invulnerable to the charge of want of due process of law."

3. Article 9 of the Ordinance adopted by the Wheeling Convention or assembly of the Restored Government of Virginia on August 20, 1861, and its companion provision carried into the W. Va. Constitution of 1862 as Section 1, Article 9, and likewise carried into the present W. Va. Constitution of 1872 as Sec. 1, Art. XIII, each quoted in the opinion of the Supreme Court of Appeals of W. Va. appended hereto, constitute a compact with the Commonwealth of Virginia as a condition precedent to the separate existence of West Virginia as a state, and require that "all private rights and interests in lands" in West Virginia "shall remain valid and secure, and shall be determined by the laws" in force in Virginia at the time of the separation. That these provisions are binding limitations on West Virginia legislation relating to forfeited and delinquent lands was held in *King* v. *Mullins*, 171 U. S. 404, 18 S. Ct. 925, 43 L. Ed. 214, and in the opinion of the trial Court in this case and authorities there cited.

BLEED THROUGH—POOR COPY

Chapter 36, Code of Virginia of 1860, requires collection of land taxes by distress on personal property if possible, for delinquency of the land where taxes cannot be made by distress, for an oath by the sheriff to his delinquent list showing that he has received no part of the tax, and that he has used diligence without success to find property subject to distress, all these requirements being omitted from Chapter 160 here involved.

It is insisted that the court erred in respect to its holding to the effect that the defendant Hill was not entitled to defend her estate on the ground that her personal property had not been first resorted to before her land was seized for the taxes, and that the delinquent list, prerequisite to any sale of lands for taxes, did not show that such personal property had been previously exhausted, and no return was made to that effect, whereas, the laws of Virginia (Code of West Virginia 1860, chapter 36), at the time of the compact, were definite in their requirements that a state of delinquency could be predicated only on the sworn return of the collector and that no personal property could be found from which the taxes could be realized before the court had authority or jurisdiction to declare a delinquency upon which a tax sale could be supported. It is held in the case of the *State* v. *West Branch Lumber Co.*, 66 W. Va. 1, that all rights acquired under these Virginia statutes "remain to this day as muniments of title to lands in this state"; and these muniments preserve the distinctions between landed and personal estate as ultimate security for taxes, as indubitably fixed in these Virginia laws for the benefit of the freehold estate.

The preference thus accorded to the ownership of land over mere chattels in the process of force for the collection of taxes and debts had its origin in Magna Carta, paragraph 9: "Neither we nor our bailiffs shall seize any land

or rent for any debt, so long as the chattels of the debtor are sufficient to pay the debt." This element of security to land was adopted by Virginia, and had full and compulsory recognition in the tax laws of that state, at the time the compact was entered into, and the compact is as follows: "All private rights and interests in lands within the proposed state, derived from the laws of Virginia prior to such separation, shall remain valid and secure under the laws of the proposed state, and shall be determined by the laws now existing in the state of Virginia"; and that measure of security to land was accordingly secured to such owners in West Virginia until levies on personal property for taxes were abolished and dispensed with as an incident to land tax sales, Acts 1941, chapter 117, and opinion in this case.

It is respectfully contended that the enactment of such statute very substantially reduced the validity and security of titles to lands as they existed at the time of the compact; and that said statute, and the court's holding thereon, impair the contract, and deny due process of law, in violation of the Constitution of the United States, cited.

Section 4, Chapter 8 of the Acts of Virginia of 1837, carried into the above Code, specifically provides not only for a sale through "a judicial proceeding" but also secures unto the former owner the protection of the usual, customary, established, judicial procedure (which would include the right to notice and opportunity to be heard in advance of declaring a forfeiture and selling—which protection is lacking in Chapter 160 here involved, in the following language:

> "* * * it shall be the duty of the said circuit superior courts of law, by orders entered of record, to direct the said commissioner to make sale of said lands in the same manner, in all respects, as in the case of other lands directed to be sold under decrees of said courts * * *"

BLEED THROUGH—POOR COPY

The case here was brought by a bill in chancery in the Circuit Court of Webster County by the Deputy Commissioner of Forfeited and Delinquent Lands of that county, under Chapter 160, Acts of W. Va. Legislature of 1947 as referred to above, for the purpose of selling land, including lands of these defendants, for delinquent taxes. These two defendants filed their separate demurrers to the bill, quoted in full in the opinion of the Supreme Court of Appeals of West Virginia, and containing the following paragraph:

> "'2. The Act of the West Virginia Legislature, Regular Session, 1947, under which this suit is prosecuted, is unconstitutional and violates both the Constitution of the State of West Virginia, and the Constitution of the United States and violates the rights of the defendant in that and in other respects and is null, void and of no effect.'"

The Circuit Court of Webster County sustained the demurrers and dismissed the bill by decree entered October 2, 1948, and quoted in full in the opinion aforesaid and here appended, and specifically reciting that chapter 160 aforesaid "violates the inhibitions of the Constitution of the United States" and "violates the Compact of the Commonwealth of Virginia with this State".

The Circuit Court of Webster County also filed a written opinion, appended hereto, and specifically stating, "my conclusion is founded on the provisions of the Constitution of the United States".

In the Supreme Court of Appeals of West Virginia, the State in its petition for appeal assigned as errors the action of the Circuit Court "in holding that * * * Chapter 160 * * * violates the inhibitions of the Constitution of the United States" and "in holding that said Chapter 160 * * * violates the compact of the Commonwealth

and this State". On the appeal the State in its brief repeated these alleged errors and briefed and argued its position thereunder. On the appeal, the brief on behalf of these defendants as appellees contained the following points which were supported by authorities and argument:

"I. *Analysis of the constitutional questions.*

"II. IN WEST VIRGINIA THE OWNER OF LAND BOUGHT BY THE STATE FOR DELINQUENT TAXES HAS RESIDUAL RIGHTS PROTECTED BY COMPACT AND THE CONSTITUTIONS, WHICH THE LEGISLATURE AND COURTS MUST RECOGNIZE AND PROTECT.

"a. *The right of redemption of the owner is a constitutionally protected right.*

"b. *The right of the owner to the surplus proceeds is a constitutionally protected right.*

"c. *The owner has the right to a day in court, the right to defend his title, to require a strict compliance with the law, to challenge the assessment and the assertion of delinquency, to show payment of the tax or redemption, to require a judicial proceeding for judicial authority to sell, and to protect his interests generally.*

"III. CHAPTER 160, ACTS 1947, VIOLATES ART. 1, SEC. 10 OF THE CONSTITUTION OF THE UNITED STATES AND ART. 3, SEC. 4 OF THE CONSTITUTION OF WEST VIRGINIA WHICH PROHIBIT LEGISLATIVE ENACTMENTS IMPAIRING THE OBLIGATION OF CONTRACTS AND AS WELL ALSO THE COMPACT BETWEEN VIRGINIA AND WEST VIRGINIA (W. Va. Constitution, Art. 13, Sec. 1).

"IV. CHAPTER 160, ACTS 1947, LIKEWISE VIOLATES THE XIV AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE III, SECTION 10 OF THE CONSTITU-

BLEED THROUGH—POOR COPY

TION OF WEST VIRGINIA RELATING TO DUE PROCESS OF LAW."

The Supreme Court of Appeals of West Virginia reversed the decree of the Circuit Court of Webster County, and, in its opinions appended, dealt at length with the constitutional questions there raised and held that Chapter 160 is not repugnant to the provisions of either the Federal or State constitutions.

These defendants then filed their petition for a rehearing in which they assigned errors as follows:

> "• • • your petitioners submit that said decision, holding and order are erroneous because your petitioners show unto your honors that said Chapter 160, Acts of West Virginia Legislature, Regular Session of 1947, violates provisions of both Constitutions (being Article 1, Section 10, of the Constitution of the United States and Article 3, Section 4, of the Constitution of West Virginia, which prohibit legislative enactments impairing the obligation of contracts, and the Fourteenth Amendment to the Constitution of the United States and Article III, Section 10, of the Constitution of West Virginia which relate to due process of law) and said Ordinance on account of the matters, things and conditions herein referred to and more particularly set out in the brief in support of this petition, and as well also appellees' brief on the original hearing of this appeal and the opinion of the trial court which is made part of the record."

With their said petition for rehearing these defendants filed a supporting brief in which the following points were stated, briefed and argued:

> "I. The reasons and holding in the present opinion result to the taking of the properties of the defendants in violation of their constitutional rights thereto secured to them by the Constitution of the United States, Article I, Section 10, and amendments thereto, Article V; and

the Constitution of West Virginia, Article III, Sections 4 and 10.

"II. Such holdings result to the recognition of the powers of the Legislature to foreclose the existing right of redemption, accorded by law at the time of the enactment of said Chapter 160 of the Acts of 1947, and declare their lands irredeemable and qualified for proceedings to sell under the processes of the Circuit Court, provided for in the State's Constitution, Article XIII, Section 4, in violation of the due process clause of the Constitution of the United States, Amendment 14.

"III. The court held that, as to the defendant Hill, she was not entitled to the process of law that required that her personal property be first resorted to before her freehold could be seized for taxes; in violation of the compact between the Commonwealth of Virginia. *Green* v. *Biddle*, 8 Wheat. 1, and authorities cited in the opinion of the Circuit Court.

"IV. That the Act of 1947, under which the proceeding is provided for, failed to provide for any representation by the present owner, in violation of his obvious rights.

"V. The court held that the lands of the defendants could be seized and exposed for sale at the suit of the State, in the circumstances, on the ground that by an enactment of the Legislature, Chapter 160, Acts of 1947, absolute title was vested in the State which in its nature and consequences justified the denial of the defendants to challenge any of the grounds upon which the State claimed its title, in violation of the rights and privileges by the Constitution accorded to the defendants and secured to them by the Constitution of the United States, Article 1, Section 10, and the due process clause of the Fourteenth Amendment to the said Constitution, all in violation of their said rights and privileges secured to them thereby, and their lands were so seized and exposed for sale in violation of their said rights and privileges."

BLEED THROUGH—POOR COPY

The Supreme Court of Appeals of West Virginia denied the petition for rehearing by order entered on the 25th day of April, 1949.

The grounds making the Federal questions substantial are evident from what has already been stated.

Cases sustaining the jurisdiction for allowing and hearing this appeal are:

King v. *Mullins, (supra);*
Green v. *Biddle,* 8 Wheat. 1;
West Coast Hotel Co. v. *Parrish* (1937), 300 U. S. 379, 57 S. Ct. 578, 81 L. Ed. 703.

Appended hereto are all opinions heretofore rendered in this case as follows:

1. Opinion of the Circuit Court of Webster County entered October 2, 1948.

2. Opinion of Supreme Court of Appeals of West Virginia, filed March 8, 1949.

3. Concurring opinion of two judges of same, filed March 29, 1949.

Also appended hereto is a copy of these Petitioners' Petition for Rehearing directed to the Supreme Court of Appeals of West Virginia.

Respectfully submitted,

BROOKS B. CALLAGHAN,
CLARENCE E. MARTIN, JR.,
CLARENCE E. MARTIN,
Attorneys for Petitioners.

EXHIBIT "A"

No. 10113

STATE OF WEST VIRGINIA

v.

JERRY M. GRAY, ET AL.

Webster County

Reversed and remanded with directions.

Fox, *Judge:*

1. Neither Article IX of the Ordinance adopted by the Wheeling Convention in 1861, nor Section 1 of Article XIII of the Constitution of this State in anywise limits the right of the State of West Virginia to impose taxes on land, and provide for their collection, so long as the methods employed therefor are not inhibited by other provisions of the Constitution of this State or by the Constitution of the United States.

2. The provisions of Chapter 95, Acts of the Legislature, 1882, as amended, incorporated as Article 3 of Chapter 37 of the Code, did not create a contractual relation between the State and the owner of property proceeded against under said Act for the purpose of selling the same for the benefit of the school fund, or in anywise limit the right of the Legislature to change the proceeding for the sale of such land under the provisions of Section 4 of Article XIII of the Constitution of this State.

3. Under Section 4 of Article XIII of the Constitution of this State, the proceeding therein required to be instituted in the circuit courts, for the sale for the benefit of the school fund, must be a judicial proceeding, which may be instituted only after the title to the land proceeded against has become vested in the State.

4. Section 4 of Article XIII of the Constitution of this State does not require that former owners, and other par-

BLEED THROUGH—POOR COPY

ties interested in land proceeded against thereunder, shall be made parties to such proceeding; but the legislative requirement of Chapter 160, Acts of the Legislature, 1947, that in such a proceeding such former owner or other named defendants shall be served with process, will be enforced by the courts of this State.

5. Section 2, Article 3, Chapter 117, Acts of the Legislature, 1941, which, in effect, eliminates the requirement theretofore existing, that before lands may be returned delinquent for the nonpayment of taxes, there must be a showing by affidavit of the sheriff, attached to the delinquent list, to the effect that the same could not be collected from personal property of the land owner, is valid and constitutional.

6. The entry of an order of publication, under Section 12, Chapter 160, Acts of the Legislature, 1947, without requiring an affidavit such as would be required to obtain the entry of such an order in an ordinary chancery suit, is constitutional and valid.

7. Section 12 of Chapter 160, Acts of the Legislature, 1947, empowers the circuit courts of this State to require the personal service of process, in suits instituted thereunder, on all persons within the jurisdictions of said courts, where such service of process can be had.

8. While the privileges extended by the State to former owners of land, under Chapter 160, Acts of the Legislature, 1947, except as to their right to the surplus derived from the sale of the lands formerly owned by them, and except as to the rights of persons under disability, are extended as a matter of grace, the same will be enforced by the courts of this State until the grant thereof is modified or repealed by the Legislature.

Fox, *Judge:*

On July 28, 1948, the State of West Virginia, by John M. Hoover, Deputy Commissioner of Forfeited and Delinquent Lands for Webster County, West Virginia, filed a bill in equity in the Circuit Court of said county, seeking the sale of twenty-four separate lots and parcels of land,

alleged in the said bill to have been sold by the sheriff of said county during some of the years from 1922 to 1943, both inclusive, purchased for the State of West Virginia, and not redeemed, and which it was alleged had become irredeemable, and, therefore, subject to sale under Section 4 of Article XIII of the Constitution of this State. The proposed sale was to be made for the benefit of the school fund, Section 4 of Article XII of the said Constitution providing that the proceeds of such sale be paid into the school fund. Said suit was instituted under the provisions of Chapter 160, Acts of the Legislature, 1947.

The bill avers the election and qualifications of Edgar B. Sims, as Auditor of the State of West Virginia, and his status as ex officio Commissioner of Forfeited and Delinquent Lands for said State; and the appointment and qualifications of John M. Hoover, as Deputy Commissioner of Forfeited and Delinquent Lands for Webster County, of said State. The bill then alleges:

> "Third: That on the 15th day of June, 1946, the said Auditor of said state certified to the Circuit Court of Webster County, West Virginia, as required by law, a list of all lands in said Webster County which were forfeited, delinquent, waste and unappropriated or escheated, and forwarded a copy of such certification to his said Deputy, John M. Hoover, which was duly received.
>
> "Fourth: That within ten days after receipt of said certified list by said Deputy from the said Auditor, the said Deputy Commissioner prepared and caused to be published and posted, as required by law, a notice to redeem.
>
> "Fifth: That said certified list is exhibited herewith and is hereby made a part of this Bill.
>
> "Sixth: That the following described tracts or lots of land, so certified, have become irredeemable, have not been redeemed or released, the title thereto remains in the State, and each is subject to sale for the benefit of the School Fund; that the certification num-

BLEED THROUGH—POOR COPY

ber, and, as to delinquent and forfeited land, the year sold or forfeited, the name of the former owner in which sold or forfeited, the location and description of each tract or lot of land herein, proceeded against, whether such tract or lot of land is forfeited, delinquent, escheated or waste and unappropriated, and the total amount due with respect to each tract or lot of land proceeded against herein, are respectively, as follows: that is to say:"

The bill then proceeds to separately list the several tracts and parcels of land proceeded against, under the head of the certificates mentioned in paragraph 6 of the bill. These certificates are numbered 319, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 339, 340, 254, 255, 256, 257, 258, 259, 260, 264 and 265.

Plaintiff asked that the suit be dismissed as to tracts numbered 258 and 331, for reasons set out in its bill. It appears from the said bill that tract number 336 was sold by the sheriff in the year 1942, presumably for the taxes of the year 1941; that tract numbers 339 and 340 were sold in 1943, presumably for the taxes of the year 1942; and it is then alleged therein that no taxes had been extended or paid on the other tracts so listed and certified.

The prayer of the bill reads as follows:

"Plaintiff, therefore, prays that the persons named in the caption hereof be made parties defendant to this suit; that process issue against the several defendants hereinbefore named; that an order of publication may be awarded and completed as to all unknown parties and claimants who have or claim an interest in the lands proceeded against herein, and that all the right, title and interest of such of them as fail to appear herein and defend their interests be forever foreclosed and held for naught; that a suitable person be appointed guardian ad litem for any infant defendants proceeded against herein, whether known or unknown, and for all unknown persons, firms and corporations, if any; that the rights of the defendants, respectively, in and to any tract or lot of land pro-

ceeded against herein may be adjudicated and determined; that it be found and adjudged by the Court that the title to each said tract or lot of land included in and proceeded against in this suit is now unqualifiedly vested in the said State, and that each such tract or lot of land is subject to sale for the benefit of the School Fund, that, should an appropriate occasion arise under Code 11A-4-20, as to any tract or lot of land proceeded against herein, then a decree of reference as to it may be made to one of the Commissioners in Chancery of this Court for such report as the Court may direct; that the Court may permit the dismissal of this suit as to any tract or lot of land herein proceeded against pursuant to the provisions of Code 11A-4-19; that a decree be entered herein authorizing and directing that each of the tracts or lots of land herein proceeded against be sold for the benefit of the School Fund, as provided by law; and that the plaintiff may have such other, further and general relief in the premises as shall seem meet and proper."

On July 27, 1948, an order of publication was entered in said suit, in the office of the Clerk of the Circuit Court of Webster County, which contains the following statement of the purposes of the suit:

"The object of the above-entitled suit is to obtain a decree of the Circuit Court of Webster County, ordering the sale, for the benefit of the School Fund, of all lands included in the suit, and for general relief. The following is a list of all such lands, setting forth as to each item its local description, the former owner in whose name the land was forfeited, or was returned delinquent and sold:"

The lots and parcels of land proceeded against were then listed under their certification number, aforesaid, and in conformity with the above quoted statement of the object of the suit. The order then ends with the following:

"The above named defendants, to wit: (again naming each of the defendants), and all unknown parties

BLEED THROUGH—POOR COPY

who are or may be interested in any of the land included in the suit are required to appear within one month after the date of the first publication hereof, and do what may be necessary to protect their interests."

This order of publication was published for three consecutive weeks, commencing August 4 and ending August 18, 1948, in two weekly newspapers published in Webster Springs, the county seat of Webster County.

On September 17, 1948, the defendants, Lillie B. Hill and B. F. Brown, made a general appearance in the cause, and filed their separate demurrers to the plaintiff's bill. These demurrers are in identical form, except as to the names of the parties filing the same, and read as follows:

"1. The bill is without equity.

"2. The Act of the West Virginia Legislature, Regular Session, 1947, under which this suit is prosecuted, is unconstitutional and violates both the Constitution of the State of West Virginia, and the Constitution of the United States and violates the rights of the defendant in that and in other respects and is null, void and of no effect.

"3. The Court is without jurisdiction to entertain this suit or to decree upon the matters set up in the bill.

"4. And for other reasons apparent on the face of the bill.

"The said defendant, therefore, prays the judgment of the Court whether he should be required to make any other defense to said bill."

The plaintiff joined in said demurrers, and the cause was submitted thereon. The order of submission, entered on the 17th day of September, 1948, reads:

"The Defendant, B. F. Brown and Lillie B. Hill this day appeared in Court and tendered and asked leave to file their respective separate demurrers in

writing, and said demurrers being inspected by the Court are ordered filed, and are filed in the manner provided by law; and thereupon the plaintiff joins in said demurrers, and says the bill of complaint is sufficient in law; and the issue is accordingly thereon joined, and said demurrers having been set down for hearing in the Court were argued by counsel; and the parties agree that the disposition of the issues arising on said demurrers shall be conclusive of the final determination of the cause, and that the Court, after deliberation on said issues, may enter any proper decree on the merits of the case after submitting the same to the counsel of record for each party, with full and free right to object and except to any final decree proposed to complete the adjudication of the case."

On October 2, 1948, the following decree was entered in the cause:

"The Court having maturely considered the questions arising in this cause submitted for final hearing by the order entered herein on the 17th day of September, 1948, is of opinion that the Act of the Legislature of 1948, Chapter 160, passed March 8, 1947, in so far as it respects lands purchased by the State, and the disposition thereof, violates the inhibitions of the Constitution of the United States, Article 1, Section 10 in the particular thereof which provides that no State shall pass any law impairing the obligation of contracts; and likewise violates the Compact of the Commonwealth of Virginia with this State in denying the owners of lands lying in West Virginia the security provided for therein for the benefit of their titles; and for the reasons above assigned and other reasons arising on the record, the Court finds and determines, adjudges, orders and decrees that said Act of 1947, Chapter 160, in so far as it concerns sales of lands purchased by the State at tax sales or any dispensation thereof by proceedings in this Court, is void and wholly insufficient to support any sale contemplated under the Constitution of this

BLEED THROUGH—POOR COPY

State, Article XIII Section 4, the sole repository of Jurisdiction in this court to make such dispositions.

"It is accordingly adjudged, ordered and decreed that the demurrers of the defendants to the plaintiff's bill, be and the same is, sustained, and the relief prayed for in the bill denied. And nothing further appearing in delay of final decree, it is accordingly adjudged, ordered and decreed that plaintiff take nothing by her suit, and the bill of complaint be dismissed.

"And the Court being of opinion that said cause is not maintainable against other parties to the cause than those appearing, doth dismiss said bill as to them for want of any jurisdiction to proceed thereof.

"The reasons and conclusions of the Court in arriving at its decision are stated in a printed opinion of the Court, endorsed by the Clerk as 'filed in the proceedings' and made a part of the record of this cause.

"The plaintiff before the foregoing decree was directed by the Court objected to the same; which objections before stated were overruled, and on his motion it is adjudged, ordered and decreed that the decree herein is suspended for sixty days to enable the plaintiff to apply to the Supreme Court of Appeals for an appeal."

On November 8, 1948, at the instance of the State, we granted this appeal.

There was filed with the decree, and made a part of the record, the opinion of the trial judge, to which, in view of the importance of the question involved, and our respect for the source of the views therein expressed, we have given mature deliberation.

The decree appealed from speaks for itself, but it may be said to be based on two propositions of law: (1) That Chapter 160 of the Acts of the Legislature, 1947, violates Section 10 of Article I of the Constitution of the United States, and in particular that part thereof which provides that: "No state shall • • • pass any • • • Law impairing the Obligation of Contracts • • •."; and (2) that said Act violates what is termed in said decree a compact be-

tween the Commonwealth of Virginia and the State of West Virginia, in respect to security of titles to land within the boundaries of this State, based upon acts of the Commonwealth of Virginia prior to the formation of this State. This opinion will be restricted to the discussion of these two propositions, with reference to such other matters only as may be necessary to cover the issue covered by the pleadings, the trial court's decree, and its opinion in the cause. The theory of the compact mentioned in the decree below will be first considered.

We need not devote time or space to discussing the causes of, or the methods employed, in effecting the separation of what is now the State of West Virginia from the Commonwealth of Virginia. Suffice to say, that it was preceded by the organization of what is known as the Restored Government of Virginia, which operated from the City of Wheeling. Delegates were elected to a convention which met in Wheeling in June, 1861, and at said convention a Governor and other State officials were elected, and thereafter assumed to exercise the power of government throughout the Commonwealth of Virginia, but as a practical matter only that part thereof which was in possession of Federal authorities. Such convention assumed the functions of a Legislature or Assembly, and had been selected by the voters of the western part of Virginia in the spring of 1861. Following the election of State officials, a movement to organize a new State began. On August 20, 1861, the Wheeling Convention or Assembly adopted an Ordinance providing for the formation of the new State out of the territory of the Commonwealth of Virginia. We are only concerned with that part of Section 9 of said Ordinance which relates to the security of land titles, and to the taxation of lands, which reads:

> "All private rights and interests in lands within the proposed State, derived from the laws of Virginia prior to such separation, shall remain valid and secure under the laws of the proposed State, and shall be determined by the laws now existing in the State of Virginia.

BLEED THROUGH—POOR COPY

"The lands within the proposed State, of non-resident proprietors, shall not in any case be taxed higher than the lands of residents therein. No grants of lands or land warrants, issued by the proposed State, shall interfere with any warrant issued from the Land Office of Virginia prior to the 17th day of April last, which shall be located on lands within the proposed State now liable thereto."

Following the adoption of this Ordinance, provision was made for the selection and organization of a convention to form a constitution for the proposed new State. This convention met in Wheeling on November 26, 1861, and remained in session several weeks. A proposed constitution was formulated by said convention and submitted to the voters within the territory of the proposed new State, at an election held on May 3, 1862, and was ratified or adopted. On May 13, 1862, the Legislature of the Restored Government of Virginia gave its consent to the formation of the new State; and on December 3, 1862, the new State was admitted into the Union by an act of the Congress of the United States. Said act contained a provisional condition which, apparently, the new State met, and, as the act authorized, the new State came into being by proclamation of the President of the United States on June 20, 1863.

In the constitution adopted in 1862, and which became effective on the admission of the new State into the Union on June 20, 1863, the subject of forfeited and unappropriated land was dealt with by Article 9 thereof. As a matter of history and because of its bearing on the issue of this cause, we quote the said article in its entirety. It reads:

"1. All private rights and interests in lands in this State, derived from or under the laws of the State of Virginia, prior to the time this Constitution goes into operation, shall remain valid and secure, and shall be determined by the laws heretofore in force in the State of Virginia.

"2. No entry by warrant on land in this State shall be hereafter made; and in all cases where an entry has been heretofore made and has been or shall be so perfected as to entitle the locator to a grant, the Legislature shall make provision by law for issuing the same.

"3. The Legislature shall provide for the sale of all lands in this State heretofore forfeited to the State of Virginia for the non-payment of the taxes charged thereon for the year one thousand eight hundred and thirty-one, or any year previous thereto, or for the failure of the former owners to have the same entered on the land books of the proper county and charged with the taxes due thereon for the said or any year previous thereto, under the laws of the State of Virginia, and also of all waste and unappropriated lands, by proceedings in the Circuit Courts of the county where such lands are situated.

"4. All lands within this State, returned delinquent for non-payment of taxes to the State of Virginia since the year one thousand eight hundred and thirty-one, where the taxes, exclusive of damages, do not exceed twenty dollars; and all lands forfeited for the failure of the owners to have the same entered on the land books of the proper county, and charged with the taxes chargeable thereon since the year one thousand eight hundred and thirty-one, where the tract does not contain more than one thousand acres, are hereby released and exonerated from forfeiture, and from the delinquent taxes and damages charged thereon.

"5. All lands in this State heretofore vested in the State of Virginia by forfeiture, or by purchase at the sheriffs' sales for delinquent taxes, and not released or exonerated by the laws thereof, or by the operation of the preceding section, may be redeemed by the former owners, by payment to this State of the amount of taxes and damages due thereon at the time of such redemption, within five years from the day this Constitution goes into operation; and all

BLEED THROUGH—POOR COPY

such lands not so released, exonerated or redeemed, shall be treated as forfeited, and proceeded against and sold as provided in the third section of this article.

"6. The former owner of any tract of land in this State sold under the provisions of this article, shall be entitled to receive the excess of the sum for which such tract may be sold over the taxes and damages charged and chargeable thereon, and the costs, if his claim be filed in the Circuit Court which decreed the sale, within two years thereafter."

A new constitution was formed later and adopted in this State in the year 1872, and in that constitution, the subject of land titles was covered by Article XIII thereof. Section 2 of said Article provided that no entry by warrant on land in said State should be thereafter made. Section 3 thereof provided for the transfer of title of land, vested in the State by forfeiture or other specified manner, to persons who might by possession and the payment of taxes, or by connecting his title with the Commonwealth, and payment of taxes, become entitled thereto. Section 6 provided for the forfeiture of land for the failure to enter the same on the land books of the several counties for the purpose of taxation. Sections 3 and 6 are not here directly involved, but we think Sections 1, 2, 4 and 5 do have a direct bearing on this controversy and, therefore, we quote them as follows:

"1. All private rights and interests in lands in this State derived from or under the laws of the State of Virginia, and from or under the constitution and laws of this State prior to the time this constitution goes into operation, shall remain valid and secure and shall be determined by the laws in force in Virginia, prior to the formation of this State, and by the constitution and laws in force in this State prior to the time this constitution goes into effect.

"2. No entry by warrant on land in this State shall hereafter be made.

"4. All lands in this State, waste and unappropriated, or heretofore or hereafter for any cause forfeited, or treated as forfeited, or escheated to the State of Virginia, or this State, or purchased by either and become irredeemable, not redeemed, released, transferred or otherwise disposed of, the title whereto shall remain in this State till such sale as is hereinafter mentioned be made, shall by proceedings in the circuit court of the county in which the lands, or a part thereof, are situated, be sold to the highest bidder.

"5. The former owner of any such land shall be entitled to receive the excess of the sum for which the land may be sold over the taxes charged and chargeable thereon, or which, if the land had not been forfeited, would have been charged or chargeable thereon, since the formation of this State, with interest at the rate of twelve per centum per annum, and the costs of the proceedings, if his claim be filed in the circuit court that decrees the sale, within two years thereafter."

We have quoted from the Ordinance of 1861, and our Constitutions of 1862 and 1872, to bring to the full light of day the documents on which is based the contention that the sovereign State of West Virginia is thereby limited and restricted in the steps it may take to collect the taxes it has lawfully imposed on its own territory. If that contention be sustained, we are not a sovereign State, because our power to sustain our government by taxation is substantially weakened. A state without the right to impose lawful taxes, and to enforce their collection lacks the essential power necessary to preserve its existence.

In rejecting this contention, as we do, we do not believe it necessary to go beyond the Ordinance and constitutional provisions quoted above. They each refer to "private rights and interests in land", and do not by their terms, or by implication, deal with the State's undoubted right to tax land and other property, and to provide for the collection thereof. The purpose in mind at the time said instruments were adopted seems clear. We know, as a matter of history, that in those days political and sectional

BLEED THROUGH—POOR COPY

passions ran high. However, the leaders of the movement to organize the new State were honorable men, and apparently desired to guard against, first, any repudiation of the lawful acts of the old Commonwealth, with respect to land titles; and second, any discrimination against nonresident owners of land. Therefore, they provided against such dangers by the Ordinance of 1861. In the Constitutions of 1862 and 1872, they guarded against the first danger by incorporating therein the substance of the provision, in respect thereto, contained in the Ordinance; and against the second, by providing in both Constitutions that all taxes should be equal and uniform throughout the State. Whether said Ordinance and the constitutional provisions aforesaid, constituted a "compact" or whether, as we prefer to believe, they constituted an ex parte solemn undertaking on the part of the people of this State, is immaterial; the pledge or undertaking should be, and, in our opinion, has been, treated as binding, and has been redeemed in good faith. We agree that, whatever it was, the Constitution of the United States, Section 10 of Article I, inhibits the violation of the obligation thereof, not only under its own terms, but as such an obligation has been interpreted and supported by cases such as *Green* v. *Biddle*, 8 Wheaton 1; *Ogden* v. *Saunders*, 12 Wheaton 213-338; *Bronson* v. *Kinzie*, 1 Howard 311. What is material is to determine what the compact or undertaking was intended to cover, and what, by its terms or by its implications, it did cover. In our opinion, the State of West Virginia has fully met the intended purpose of the quoted portion of Article 9 of the Ordinance of 1861, by the constitutional provisions of 1862 and 1872. Of course, we must rest our opinion in this matter on the provisions of the Constitution of 1872. What was contained in the Ordinance of 1861, and the Constitution of 1862, are considered as background in interpreting the force and effect of the present Constitution.

We can see nothing in the Ordinance and constitutional provisions, aforesaid, to support the theory that any limitation was intended to be placed on the right of the State of West Virginia to deal with its own territory, by way

of taxes, or otherwise, so long as the provisions of the Federal Constitution were not violated. The sovereign right to tax would be worthless without the power to enforce the payment of the taxes imposed; and the right to enforce the payment of such taxes necessarily carries with it the right to proceed against delinquents, either by creating a lien on the thing taxed, or otherwise, as the Legislature may prescribe. As is well known, the taxing power is vested solely in the Legislature, and so long as it does not amount to confiscation is virtually unlimited. It is inconceivable that the framers of our Constitutions, and the Ordinance of 1861, ever intended to surrender this power, so essential to the existence of the State they were then proposing to organize and establish.

Furthermore, when the Ordinance of 1861, and the Constitution of 1862, were formulated and adopted, it was not at all certain that the Commonwealth of Virginia and the proposed new State would be members of the same Union or Confederation of States. At that time the outcome of the war between the States was in doubt. A victory for the Confederate States would have firmly placed Virginia in that Confederacy, and a new nation would have been born. The paramount purpose of the organization of the new State of West Virginia was to hold it within the Federal Union, and this being true, how is it possible to conceive that the men who framed the Ordinance of 1861, and the Constitution of 1862, had it in mind to surrender a power, so important to the future of the proposed new State, to another state which, as the outlook then was, might be a member of a foreign, even hostile, nation. In our opinion, they did not so intend and they did nothing more than to provide that titles to land, as they had been acquired at that date, should be tested by the then laws of Virginia; and that the lawful acts of that Commonwealth, in respect thereto, would not be repudiated by the new State. It is now contended that what they did was, not only that which we have stated, but further that they surrendered to Virginia, or any one entitled to rely on said Ordinance and constitutional provisions, the right to have the laws of Virginia as they existed prior to 1861,

BLEED THROUGH—POOR COPY

in so far as they pertain to the sale of delinquent lands enforced for their benefit; and that this state may not pursue its own policy in respect thereto, so long as such policy conflicts with the laws of Virginia in respect thereto, as they existed in ante bellum days.

To show that no such result was intended, we have only to read the provisions of Article IX of the Constitution of 1862, and Article XIII of the Constitution of 1872. In both there is a marked departure from the laws of Virginia in respect to the sale and disposition of forfeited and delinquent lands. We need not go into detail, but a reading of Chapter 114 of the Code of Virginia, 1860, will disclose the extent of that departure. In discussing this point, Judge Poffenbarger, in *State* v. *West Branch Lumber Co.*, 64 W. Va. 673, 63 S. E. 372, said:

> "Chapter 114 of the Code of 1860 constituted the law on this subject at the time of the formation of this State. By the Constitution of 1863, that policy was very materially departed from. The provisions of that Constitution have practically no bearing upon this question. By the Constitution of 1872, the substance of these Virginia Statutes was incorporated into the six short sections of Article XIII. That Article preserves, as did the Constitution of 1863, all rights acquired under the Virginia statutes, and those statutes remain to this day as muniments of title to lands in this state. The forfeiture policy of the Virginia law was inserted in Section 6 of Article XIII of the Constitution and the transfer principles were embodied in section 3 of that article."

It would seem unreasonable to suppose that the framers of said Constitution intended, in the first sections of the Articles above mentioned, to tie this State to the laws of Virginia, as they existed in former years, and then by every other section of said articles make wholly different provisions for the sale of forfeited and delinquent lands. It is quite evident that they considered themselves free to exercise their judgment as to the proper procedure in a

matter which had vexed the old Commonwealth, and continues to vex the new State to this day.

At this point, on the theory of contemporaneous construction, followed over a long course of years, we think, it is not improper to note that in all the litigations over land titles in this State, embracing every question which the minds of the great lawyers of the past could originate and present to our courts, from a date shortly after the adoption of the Constitution of 1872 to this day, the authority of this State to legislate, within the limits of the State and Federal Constitutions, on the subject of forfeited and delinquent lands, free from any supposed compact with the Commonwealth of Virginia, has not been questioned, until this suit was instituted. The question being raised more than three quarters of a century after the date when it might have been posed, and after this State has, for more than seventy years, under different statutes, disposed of forfeited and delinquent lands in a manner different from that authorized by the laws of Virginia prior to 1861, must, for the sake of the security of land titles in this State, be disposed of once and for all. We hold, therefore, that the trial court erred in holding that Chapter 160 of the Acts of the Legislature, 1947, was unconstitutional by reason of any supposed compact between the Commonwealth of Virginia and this State. We hold, also, that Section 10 of Article I of the Constitution of the United States has no application to the Ordinance and constitutional provisions aforesaid, because the same do not constitute a compact which in any way limits the power to the Legislature of this State to impose and collect taxes on its own territory.

The second question which we must determine relates to the procedure for the sale by the State of land returned delinquent for nonpayment of taxes, sold by the sheriffs of the several counties, purchased by the State, and not redeemed within the time provided by law. The sales here dealt with, other than three tracts sold in 1942 and 1943, were made prior to the enactment of Chapter 117, Acts of the Legislature, 1941, which repealed Article III of Chapter 37 of the Code of 1931, and substituted a new

BLEED THROUGH—POOR COPY

system for the sale of lands so acquired by the State. A determination of this question calls for discussion of the history of this State's dealing with land which was acquired by it at tax sales, subsequent to the adoption of our Constitution of 1872.

The pertinent provisions of Article XIII of the Constitution of 1872 have been quoted. The first legislation, under said Article, was by Chapter 134, Acts of the Legislature, 1872-3, and that Act provided for the sale of delinquent and forfeited lands. It did not differ materially from Chapter 105 of the Acts of 1868, except that it added a section protecting the former owners in their right to the surplus derived from any sale made, as provided for in Section 5 of Article XIII of the Constitution. In 1884, in the case of *McClure* v. *Maitland*, 24 W. Va. 561, Chapter 134 of the Acts of 1872-3 was interpreted as follows:

> "The proceedings provided by chapter 134 of the Acts of 1872-3 for the sale of lands for the benefit of the school fund are not judicial proceedings in the sense that they involve litigation between contesting parties; nor are they proceedings technically either *in rem* against the land, or *in personam* against the former owner of the land; but are in their character administrative, being simply a mode prescribed by the State for the sale of lands, which are her absolute property, and in the sale of which she alone is interested.
>
> "The effect of section 5 of article XIII of the Constitution of this State, giving to the former owner the surplus proceeds of the land over the taxes, &c., does not confer upon him any interest in the land or right to participate in, or be a party to, the proceedings for the sale of it. The grant to him of such surplus proceeds is wholly gratuitous, and his claim thereto is confined to the proceeds as such and he can obtain them only in the manner prescribed by law.
>
> "The former owner, having no interest in the land or the proceedings for its sale, is not entitled to be a party to the proceedings for the sale in the circuit court, and he, consequently, cannot appeal to this Court."

In the course of the opinion in that case Judge Snyder said:

> "The title to the land and all the right and interest of the former owner having thus by his default and the operation of the law become absolutely vested in the State and become irredeemable, she having thus acquired a perfect title to, and unqualified dominion over, the land, had the undoubted right to hold or dispose of it for any proper purpose, in any manner and upon any terms and conditions she might in her sovereign capacity deem proper without consulting the former owner or anyone else. For after the forfeiture had become complete, as it had in the case before us, the former owner had no more claim to or lien upon the land than one who never had pretended to own it. * * * The laws, as we have shown, by their own force, transferred to and vested the title to the land absolutely in the State without any judicial enquiry or inquest of any kind. There could, therefore, be no necessity or reason for proceeding *in rem* against the land. That had already become the absolute property of the State and she had a perfect right to sell it without further enquiry. All the laws providing for the sale of these lands pre-suppose the title to have vested in the State prior to the commencement of the proceedings. In fact the whole authority of the commissioner and the jurisdiction of the court are based upon the assumption that the unconditional title is in the State; for unless such is the fact neither has any authority to act—*Twiggs* v. *Chevallie*, 4 W. Va. 463.
>
> "And all the right, title and interest of the former owner having been completely divested, he has not a particle of interest in the land—no more than if he had never owned it—there is, therefore, no possible reason for making him a party or proceeding against him *in personam* or otherwise. The proceeding is of necessity then neither *in rem* nor *in personam*; and as all judicial proceedings properly so styled must belong to either the one or the other of these classes, it follows, that this is

BLEED THROUGH—POOR COPY

not and can not be in any technical sense a judicial proceeding."

The holding in *McClure* v. *Maitland, supra*, that the proceeding required under Section 4 of Article XIII of the Constitution was not a judicial proceeding, did not apparently meet with the approval of the Legislature, as will hereinafter appear; and this Court, in *Sims* v. *Fisher*, 125 W. Va. 512, 25 S. E. (2d) 216, held that:

> "Under Section 4 of Article XIII of the Constitution of this State, the proceeding therein required to be instituted in circuit courts for the sale of lands for the benefit of the school fund, must be a judicial proceeding, requiring process or notice in advance of hearing."

So far as we know, the ruling of *McClure* v. *Maitland* still stands except as modified by *Sims* v. *Fisher*. The ruling in *McClure* v. *Maitland* was based upon the provisions of Chapter 134, Acts of 1872-3, and the holding therein that to sustain a proceeding under Section 4 of Article XIII, absolute title to the land was required to be vested in the State, has been upheld throughout the years, and recently in the case of *State* v. *Farmers Coal Co.*, —— W. Va. ——, 43 S. E. (2d) 625. Therefore, we rest our discussion on the basic fact that at the date of the institution of this suit, the former owners of land sought to be sold, and those claiming any interest therein, had lost all right, title or just claim to any of said lands, or any interest therein. The proposition advanced by one of counsel for the appellees, that under Section 4 of Article XIII, the right of redemption still exists, runs counter to all law on the subject, and if sustained would nullify the proceeding provided for in said section, and the State would be deprived of all power to dispose of the land, the title to which had become vested in it under the Constitution and laws of the State.

On March 18, 1882, the Legislature enacted a statute which radically changed the proceeding provided for by the Act of 1872-3, with which we have been dealing. This was effected by Chapter 95, Acts of the Legislature, 1882.

That Act provided for a judicial proceeding for the sale of lands under Section 4 of Article XIII of our Constitution. It provided that such proceeding should be instituted by the Commissioner of Delinquent and Forfeited Land of the county in which the land proposed to be sold was located by the filing of a petition in the circuit court of said county, containing a full description of the land proposed to be sold, its value, and the name of any claimants thereto. Upon the filing of such petition, the persons effected thereby were required to be summoned to appear before a commissioner in chancery to show why the land should not be sold for benefit of the school fund, and said petition was required to be referred to a commissioner in chancery. Various provisions were made for the protection of the rights of former owners, and the case was to be proceeded with according to the rules pertaining to regular chancery causes. There has never been any doubt that under this Act the proceeding was a judicial one, and it has been so held in many cases among which are: *Holly River Coal Co.* v. *Howell*, 36 W. Va. 489, 15 S. E. 214; *Hays* v. *Camden's Heirs*, 38 W. Va. 109, 18 S. E. 461; *Moore* v. *McNutt*, 41 W. Va. 695, 24 S. E. 682; *Sims* v. *Fisher, supra.*

This statute, with amendments, not here material, remained in force and effect until the enactment of Chapter 117, Acts of the Legislature, 1941, and with exception of three tracts, all of the lands sought to be sold in the pending suit were sold prior to the enactment of the 1941 statute. Of course, as the statute existed prior to 1941, the owner of property was charged with the duty of paying his taxes, and was accorded the right to redeem his land at any time prior to the date fixed when the land became irredeemable and became the absolute property of the State. The present contention appears to be that the former owners of property, the title to which has become absolutely vested in the State through its purchase at a sheriff's tax sale, and the failure to redeem within the time required by law, have some character of contract right which entitles them to insist that before the land they formerly owned can be sold by the State, all of the

BLEED THROUGH—POOR COPY

terms and provisions of the 1882 statutes, as amended (Code, 37-3) must be complied with; that out of that statute some character of contract has arisen binding the State, and on which a former owner may rely; and it is said that failure to comply with such supposed contract amounts to a violation of the obligation thereof, inhibited by Section 10 of Article I of the Constitution of the United States. This is the heart of the question submitted to us for our determination.

Chapter 117, Acts of the Legislature, 1941, was intended to be and was a radical departure from the law as it existed prior to the date of such enactment. In the first place it returned to the administrative procedure for the sale of forfeited and delinquent lands which this Court, through Judge Snyder, upheld in *McClure* v. *Maitland, supra,* and the duty of the administration of the plan proposed was imposed on the Circuit Courts of the several counties of the State. As stated above, we held in *Sims* v. *Fisher, supra,* that the proceeding provided for in Section 4 of Article XIII of our Constitution should be a judicial proceeding. We further held that if an administrative proceeding was permissible, the Legislature could not impose upon courts the duty of administering such a plan, and on that ground the Act was held unconstitutional. But there was no holding in that case on the question of the legal right of former owners to be made parties to such a proceeding and to have notice thereof, and that question was not raised.

By Chapter 140, Acts of the Legislature, 1945, a further attempt was made to provide for the sale of forfeited and delinquent lands, title to which was vested in the State, and following our holding in *Sims* v. *Fisher, supra,* the proceeding provided for in that act was a judicial one. But, the Legislature made the mistake of permitting the redemption of lands sold for taxes at any time after the sheriff's sale, and before the final confirmation of sale in the Circuit Court in the county in which it was located, the effect of which was that the land could never become irredeemable and, therefore, not subject to sale under Section 4 of Article XIII of the Constitution. This act was

held unconstitutional on this ground in *State* v. *Farmers Coal Co., supra.*

The Legislature, by Chapter 160, Acts of 1947, made still another attempt to provide for the sale of forfeited and delinquent lands. This Act corrected the defect pointed out in *State* v. *Farmers Coal Co., supra,* and fixed a date when redemption of lands theretofore sold might be affected, and provided that after such date the land should become absolutely irredeemable; and provided for a judicial proceeding for the sale of lands as provided by Section 4 of Article XIII, aforesaid. This legislation was subjected to a vigorous attack in the Circuit Court of McDowell County, in the case of *State* v. *Blevins,* and was considered by this Court on appeal. See *State* v. *Blevins,* — W. Va. —, 48, S. E. (2d) 174. We will not go into detail in discussing the holding in that case. We upheld the provision of the Act providing for the entry of an order of publication without affidavit, and held that such method was not in violation of the Federal or State Constitutions. We further held that:

> "A former owner of land sold or forfeited to the State for nonpayment of taxes or nonentry on the land books, and those claiming under, or acting for, such owner, are not denied, by Code, 11A-4-27, as amended any privilege or immunity guaranteed by the Fourteenth Amendment to the Constitution of the United States and by Section 10 of Article III of the Constitution of West Virginia. Nor is such former owner and those in privity with him deprived of any property by such statute."

Many other questions passed upon in our decision in that case, we do not deem necessary to discuss.

This brings us to the point where it seems necessary to outline the provisions of Chapter 160, Acts of 1947, which bear on the points at issue in the case now before the Court, and this calls for some detail references to the Act itself. We do not think it necessary to discuss the declaration of the legislative purpose, the section constituting the Auditor as Commissioner of Forfeited and

BLEED THROUGH—POOR COPY

Delinquent Lands of the State, and providing for the appointment of a deputy commissioner in each of the counties, nor Section 9 of the Act requiring the Auditor of the State to certify a list of lands to be sold to the Circuit Courts of each county of the State. Section 10 provides that as soon as possible after receipt of such list, the Deputy Commissioner of Forfeited and Delinquent Lands shall institute, in the circuit court of his county, a suit or suits in chancery for the sale, for the benefit of the school fund, of all lands included in the list certified. Section 11 provides that in such suit there shall be named as party defendant the former owner in whose name any of the land proposed to be sold was forfeited or returned delinquent and sold by the sheriff, and other persons known to have a claim or interest in the land proposed to be sold. Section 12 provides for the form of the summons to be issued in such suit, and that: "The summons shall be served on the named defendants in the manner provided by law for the service of process in other chancery suits." The section further provides that the clerk of the Circuit Court, at the time he issues the summons, should enter an order of publication without the filing of affidavit as required in other cases, and then goes on to prescribe the form of such order, and what it shall contain, specifically providing that it shall list all lands proposed to be sold, and give the name of the former owner, the names of such other defendants as may be interested therein, and that it shall require all unknown parties who are or may be interested in any of the land to appear within one month after the date of the publication thereof and protect their interests. Up to this point it would appear that, except for the provision for entering an order of publication without affidavit of non-residency, or other matters which would justify such an order in regular cases, the requirement that the former owner be made party and served with process does not differ from the law as it was prior to the Act of 1941, aforesaid. But, at the end of the section there is added this language:

> "In view of the fact that the state has absolute title to all forfeited land, to all land sold to the

state for nonpayment of taxes and become irredeemable, to all escheated land, and to all waste and unappropriated land, and must under the constitution have such an absolute title before the land may be sold for the benefit of the school fund and in view of the fact that the former owner of any such land, or any person claiming under him, has no further interest therein nor rights in respect thereto except such privilege of redemption as may be extended to him by the Legislature as an act of grace; and in view of the further fact that all parties known and unknown who may claim an interest in any of the lands included in the suit are given notice thereof by the order of publication provided for above; therefore, the Legislature deems it both expedient and necessary to provide that failure to name any such person as a defendant, or failure to serve the summons on any named defendant, shall in no wise affect the validity of any of the proceedings in the suit for the sale of the state's title to such land."

The apparent inconsistency disclosed by the provisions of the section lies in the fact that one provision requires that the summons issued shall be served on named defendants in the manner provided by law for the service of process in other chancery suits, and the other that the failure to do so shall in no wise affect the validity of the proceeding, from which it may be argued that a Deputy Commissioner of Delinquent and Forfeited Lands may name or fail to name the former owner or other interested parties as defendants, and serve or fail to serve the process issued in the suit, without risk of invalidating any proceedings which might be taken in the cause. The Act then goes on to provide, in Section 18, for the redemption of lands before confirmation of sale. By Section 19 it provides that any person substantially interested might appear in the circuit court, any time before the sale, and move for the dismissal of the suit on any one of six grounds, namely: (1) That all taxes due thereon were paid before the sale to the State; (2) that the land was redeemed after

BLEED THROUGH—POOR COPY

the sale to the State; (3) that the land was not escheated; (4) that the land was not forfeited for nonentry; (5) that the land was sold to him for the benefit of the school fund and had not thereafter been sold for nonentry; and (6) that he had acquired title to the land by transfer under the provisions of the Constitution. Sections 20 and 21 provide for a reference to commissioners in such cases and the execution of such references. Then follows provisions for the decree of sale, the notice of sale of the land, its purchase by anyone other than the former owner or a deputy commissioner or other officer acting in connection with the proceeding. Section 28 protects the right of the former owner to the surplus. Section 30 provides that any person entitled, under the provisions of Section 19 of the Acts, who has not learned of suit in time to protect himself before the sale, might at any time after the sale, and before confirmation, apply to the court for an order setting aside such sale. Provision is made in the Act for redemption by persons under disability, and other sections relate to the reports required to be made, and the disposition of the fund realized from the sale. Section 39 of the Act releases all taxes prior to the year 1936, an act of grace which was no doubt offered as an inducement to delinquent tax payers to redeem their property.

The attack on this statute is, in our opinion, somewhat nebulous. Running through the several points of attack are insinuations, if not direct charges, of some unholy purpose or artful design to by-pass certain alleged rights of former owners, and others interested in land proposed to be sold, but as we read this Act, we think the interests of former owners are fully protected, unless it be the provision of Section 12 of the Act under which it may be claimed that lands formerly owned by an individual may be sold without notice to him, or the service of any process. Undoubtedly, if the former owner had any legal right or interest in the land proposed to be sold, after the same had become irredeemable, and absolute title thereto had become vested in the State, something which, as we see it, is, logically, impossible, then the failure to give notice

by legal process would make void any order or decree entered in the cause, so far as the same affected the interest of the person who was not served with process. This is a proposition of law so fundamental as to require no further discussion. The whole question is reduced to the point whether the former owner of land, having lost all of his right, title, and interest therein, through his own fault, in that he has failed to perform his duty to the State by the payment of his taxes, and the land having become the absolute property of the State, may question the right of the State to dispose of the same without notice to him. That, it is contended, in substance and effect, is what Section 12 of the Act provides, and, on the basis of that contention, we must determine whether that provision of the Act may stand the test of our State and Federal Constitutions.

The question, in the last analysis, is one of legislative power. By the Acts of 1872-3, the Legislature set up and provided for the disposition of forfeited and delinquent lands. According to *McClure* v. *Maitland, supra,* neither that Act, nor the Constitution of 1872 on which it was based, required that the former owner of land should be made party to the proceeding provided for by Section 4 of Article XIII of the Constitution. The Acts of 1882, above referred to, changed that system and provided for a judicial proceeding, in which former owners were required to be made parties, and the proceedings for the sale of such lands, provided for in the Constitution, were to be conducted generally as in other suits in chancery. So long as that legislation remained in existence, this Court enforced the same to the letter. As late as 1937, in the case of *Bank of Quinwood* v. *Becker,* 119 W. Va. 534, 194 S. E. 849, we held that the failure to make interested persons parties to a proceeding to sell lands vested in the State, under purchase at a tax sale, was fatal to the proceedings, so far as it effected the persons not made parties to the suit. To the same effect is *Neal* v. *Wilson,* 79 W. Va. 482, 92 S. E. 136. In that case, however, it was stated in the body of the opinion that:

> "The power of the Legislature to provide for a sale of the State's land, without any judicial in-

BLEED THROUGH—POOR COPY

quiry whatever, as was formerly done, must be admitted, * * *."

This quoted statement, which has been disapproved in *Sims* v. *Fisher, supra,* indicates that while the Court, at that time, was disposed to hold litigants to the strict letter of the statute of 1882, the right of the State to proceed in another manner, and without requiring such persons to be parties, was conceded. But, the fact that the Legislature has at one time adopted a particular plan for the sale of delinquent and forfeited lands, does not mean that the same Legislature, or a succeeding one, may not change that plan and adopt a different one provided, of course, it does not infringe upon the provisions of the Constitution of the United States or of this State. The whole question resolves itself into this: Does the former owner of land, who, through his failure to pay his taxes either in the first instance or by the redemption process, have any legal right to be consulted, or to be notified, as to any proceeding which the State of West Virginia may institute, under Section 4 of Article XIII of our Constitution, to effect the sale of its own property? Or, to state it another way: Does an act of the Legislature, which, as a matter of grace, has extended to the former owner the privilege, or, it may be the statutory right, to redeem his land from a tax sale, and which, at the same time, provides for a certain procedure on the part of the State in proceedings to sell land, after the privilege or statutory right to redeem has ended, and the absolute title thereto has become vested in the State, create a contract between the State and such former owner, which subsequent Legislatures may not in anywise impair by the exercise of legislative power?

The fundamental error of those who would sustain the theory of a contract between the State and former owner of real estate sold for nonpayment of taxes and purchased by the State lies in their ignoring the fact that the supposed contract which they would enforce is based upon the fault of the former owner. We have heretofore adverted to the duty of all citizens to contribute to the bur-

den of taxation, necessary to the existence of the State, whose government is set up for their benefit and protection. We do not think it should be held that a taxpayer may be permitted to fail in his duty to the State, and use that failure as a basis for the assertion of a contract right which would tie the hands of the State in the collection of its taxes. When we say that a taxpayer, who fails in his duty in that regard, is at fault, we mean legally at fault. We are fully aware that circumstances may arise where the failure to pay taxes is the result of circumstances beyond the control of the taxpayer, and a person in that situation should not be condemned therefor. In other cases, however, failure to pay taxes is due to neglect, and in some instances to a deliberate design to evade the payment of taxes. Statutes which provide for the enforced collection of taxes should not be nullified to meet the convenience of the taxpayer; just as in the case of the collection of any debt, the enforcement of laws are not denied the creditor merely because of the poverty of the debtor, or his disinclination to pay his debts.

Aside from this, we find no support in the authorities for the proposition that where there has been a sale of real estate for the nonpayment of taxes, and its purchase by the State; and where there exists a statute under which he is given time to redeem, and fails to do so; he may prevent the collection of such taxes on any theory of a contract which limits the State in its remedy to subject to sale the property taxed, under some theory of a contract not to do so. It is true that land sold by a sheriff for taxes to individual purchasers, creates a contract with the State, in respect to the time in which the same may be redeemed, and as to other provisions of the statute as it existed at the time of sale. See *Forqueran* v. *Donnally*, 7 W. Va. 114; *Milkint* v. *McNeely*, 113 W. Va. 804, 169 S. E. 790; *Lemley* v. *Phillips*, 113 W. Va. 812, 169 S. E. 789; *Arbogast* v. *Donahoe*, 120 W. Va. 53, 195 S. E. 672. But in Cooley on Taxation, 4th Ed., Sec. 1561, it is stated:

> "• • • Lengthening the time within which the land may be redeemed, as applicable to tax-sales

BLEED THROUGH—POOR COPY

already made, is unconstitutional as impairing the obligation of a contract. The same rule, some have thought, should apply to a statute shortening the time to redeem; as it is equally unjust to legislate against the owner of the land in such circumstances as in his favor. But with him there is no contract when the sale is made, and the remedy by redemption which the statute gives him, like remedies in general, is subject to legislative discretion. Where lands are struck off to the state, there is unquestionable power in the legislature to favor or relieve the owner of the land to any extent it may see fit."

This, we think, is unquestionably true in a case where land has been sold to the State, not redeemed, and has become the absolute property of the State, for the reason that the land owner has been given his opportunity to redeem and has failed to do so, and when he has failed to do so he has lost all of his right, title and interest in the property involved. *McClure* v. *Maitland, supra; State* v. *Farmers Coal Co., supra.* We find the subject discussed in 51 Am. Jur. under the head of Taxation, Sections 1127, 1128, wherein it is said:

"Although tax redemption statutes which define the time within and the conditions upon which a property owner may redeem his property from a tax sale are universally recognized as giving rise to contractual obligations in favor of the tax sale purchaser which cannot be changed in matters of substance to his detriment after he acquires title at a tax sale, there is a difference of opinion as to whether rights of the property owner may be so regarded. It seems to be the theory of the majority of the cases directly considering the question that since the right of redemption and time for exercising it are accorded by the state as matters of grace and not of right, the legislature has the power to modify the exercise of the right in substantial particulars by subsequent legislation. Under this rule, statutes reducing the period of redemption from tax sales, when given retroactive operation

to previous sales, do not constitute an unconstitutional impairment of contract obligations. In this connection it is to be noted that in several cases the validity of a retroactive provision reducing the redemption period has been sustained upon the theory of being remedial in character. Moreover, the property owner cannot, on the ground of impairment of contract obligation, complain of a subsequent enacted statute according to the tax sale certificate holder a privilege or proceeding under such new act to foreclose the owner's right of redemption, where the choice to proceed under the new act results in giving the delinquent taxpayer more time within which to redeem.

"Many cases, on the other hand, support the view that the owner's right of redemption from a tax sale, although of purely statutory origin, is contractual in its nature, and, in all matters of substance, must be governed by the law in force at the time of the tax sale, at which time the right of redemption attaches, and cannot be affected in matters of substance by subsequent legislation. And in applying this rule, it has been held that an attempt to reduce the period of time for redemption, if retroactively applied to a sale made before the passage of the statute, is unconstitutional."

Chapter 160, Acts of 1947, gives to the former owner additional time in which he may redeem, and specifically fixes a date beyond which date he may not redeem, and at which time, by reason of his failure to avail himself of the opportunity to redeem, he loses all of his right, title and interest in the property.

It is further stated in the last cited authority, Section 1128, that:

"It is to be noted that the rights of purchasers at tax sales which are protected from subsequent legislation are those of private purchasers. Rights of a county, municipality, or other political subdivision purchasing in property at a tax sale with respect to rights of redemption are not considered contractual in their nature, and are not protected from impair-

BLEED THROUGH—POOR COPY

ment of subsequent legislation by the guaranty of impairment against obligation of contract. Neither does the rule that rights in tax proceedings are to be determined by the law in force at the time of the tax sale prevent the legislature from making changes in the manner of enforcing the lien which do not substantially impair any of the obligations of the contract."

In *Mercury Herald Co.* v. *Moore*, Cal., 138 P. (2d) 673, 147 A. L. R. 1111, and, in an annotation thereto, this theory is clearly upheld, and it is stated in the body of the opinion in that case that:

"This court has held in numerous cases, and it appears to be in agreement with the weight of authority, that the general relationship of sovereign and taxpayer is not founded on, nor does it create, any contractual rights; and the obligation of the citizen to pay taxes is purely of statutory creation, and taxes can be levied, assessed and collected only in the method provided by express statute. * * * It has also been held by this court that the power of taxation is not founded upon consent or agreement but, rather, that tax proceedings are in invitum, and has given that as its reason why all tax proceedings should be strictly construed. Judge Cooley in his work on taxation points out that as between the owner of property and the sovereign power imposing the tax there is no relationship based upon contract and that as to the owner, 'the remedy by redemption which the statute gives him, like remedies in general, is subject to legislative discretion'."

See also *James Alexander, Inc.* v. *United States*, 128 F. (2d) 82; *Messer* v. *Lang*, 129 Fla. 546, 176 So. 548; *State Nat. Bank* v. *Morthland*, 196 Ark. 346, 118 S. W. (2d) 266; *Muirhead* v. *Sands*, 111 Mich. 487, 69 N. W. 826; *Baker* v. *State Land Office*, 294 Mich. 587, 293 N. W. 763; *Butler* v. *Palmer*, 1 Hill (N.Y.) 324.

No authority has been cited by the appellees which conflicts with the principles announced in the cases above referred to, and the other authorities cited. The authorities cited amount to nothing more than to express the general rule that no one has a vested right in a given procedure, so long as the procedural change made does not materially affect vested rights. We know, as a matter of common knowledge, that changes are frequently made in statutes with respect to the time within which jurisdiction may be invoked in the courts of the land, and we do not think a case can be found which holds such laws to be unconstitutional, so long as they do not materially affect vested rights. This Court, in *McClintic* v. *Dunbar Land Co.*, 127 W. Va. 454, 33 S. E. (2d) 593, stated in the body of the opinion that:

> "However, a mere change in the remedy for the enforcement of contract rights in the courts of the State, or otherwise, is not treated as an impairment of the obligation of a contract, so long as the person whose rights arise thereunder is given a reasonable opportunity, after the creation of such a limitation, to enforce his contract."

That case was decided on the basis of an existing contract, a situation which we do not think arises in this case, because we do not believe there was ever any character of contract between the former owner and the State of West Virginia which such former owner may invoke to impede or destroy the right of the State to collect its taxes. After all, that is the underlying purpose of Section 4 of Article XIII of our State Constitution.

The procedure for the collection of taxes stands on a different footing from suits, actions and other proceedings for the collection of debts under the common law, or statutes designed therefor. That subject was fully discussed in *State* v. *Blevins, supra.* That summary proceedings may be resorted to for the collection of taxes is well sustained by the authorities. In 3 Cooley on Taxation, 4th Ed., Section 1326, it is stated:

BLEED THROUGH—POOR COPY

"Very summary remedies have been allowed, in every age and country, for the collection by the government of its revenue. * * * The protective principles of the common law are not supposed to be violated by a resort to summary proceedings in these cases. Summary processes are not necessarily unjust, * * * There is a tacit condition annexed to the ownership of property that it shall contribute to the public revenue in such mode and proportion as the legislative will shall direct. * * *"

In the same authority, Section 1405, it is stated:

"Proceedings of this nature are not usually proceedings against the parties, nor, in the case of lands or interests in lands belonging to persons unknown, can they be. They are proceedings which have regard to the land itself rather than to the owners of the land, and if the owners are named in the proceedings and personal notice is provided for, it is rather from tenderness to their interests, and in order to make sure that the opportunity for a hearing is not lost to them, than from any necessity that the case shall assume that form. * * *"

We need only add that in *King* v. *Mullens,* 171 U. S. 404, it is stated in the body of the opinion that:

"Much of the argument on behalf of the plaintiff proceeds upon the erroneous theory that all the principles involved in due process of law as applied to proceedings strictly judicial in their nature apply equally to proceedings for the collection of public revenue by taxation. On the contrary, it is well settled that very summary remedies may be used in the collection of taxes that could not be applied in cases of a judicial character."

The opinion then goes on to discuss that statement and the same appears to be amply supported by the authorities there cited.

As we have stated, every substantial argument against the constitutionality of Chapter 160, Acts of 1947, centers on Section 12 of that Act. There seems to be a strange misconception as to the force and effect of that section. The statute begins by providing that a summons shall issue, and then provides: "The summons shall be served on the named defendants in the manner provided by law for the service of process in other chancery suits." We would only have to refer to Article 3 of Chapter 56 of the Code, to determine how process should be served. There is, however, the provision for the entry of an order of publication, without filing the affidavit which would be required in ordinary chancery suits. We have heretofore held this particular provision to be valid. *State* v. *Blevins, supra.* As to parties who by reason of non-residence, or otherwise, are not served with process, it does not seem to us that any substantial right has been taken away from them by this provision. An order of publication is required to be entered, and when entered and published serves to give the same notice that interested parties would have received had there been filed an affidavit of their nonresidence, or the setting up other grounds which, under general law, would authorize the entry of an order of publication. But, the section ends with this sentence: "* * * therefore, the Legislature deems it both expedient and necessary to provide that failure to name any such person as a defendant, or failure to serve the summons on any named defendant, shall in no wise affect the validity of any of the proceedings in the suit for the sale of the state's title to such land."

As we construe this statute, it is the mandatory duty of the State, in a suit instituted by it under Section 12 of Chapter 160, of the Acts of 1947, to secure the personal service of process on all named parties residing within the jurisdiction of the court in which the suit is instituted. It seems to us to be within the power of the circuit courts, and, in our opinion, their duty as well, to require process to be served on all persons within their jurisdiction. It is not necessary to comment on the undoubted power of the courts to make and enforce this requirement. In the case

BLEED THROUGH—POOR COPY

at bar, the appellees, the only parties appearing in the case, have either been served with process, or by their general appearance in the cause, have waived that service, and they stand in court in the status of persons who have been served with process. The last sentence of Section 12 quoted above does not prejudice them, for the reason that they are in court with the right to make the defenses hereinbefore referred to, with the privilege or right of redemption, and the right to exercise the other privileges or rights which the statute gives them. In our opinion, Section 12, as a whole, is constitutional on the theory that, as so early held in *McClure* v. *Maitland, supra,* a former owner of land, or persons holding liens against same, have lost all their rights when the title to the land they own or had claim to became completely vested in the State. Even if this were not true, the question of the unconstitutionality of the last sentence of that section could only arise in a suit to sell such land, where there had been no process served on the former owner or other interested party, in a case where such process could be had. Giving to the Act this construction, we are unable to see where the appellees in this case have been deprived of any substantial right, assuming, for the sake of argument, they had any right in the land involved at the date of the institution of this suit. As to residents of this State, Circuit Courts of the several counties have it within their power to require the service of process on all defendants within their jurisdictions, and we will not assume that they will fail to exercise that power. When this is done there would seem to be little in which any former owner can complain. In making this holding, we follow the holdings of this Court under the Act of 1882, and make effective the legislative mandate.

In view of the mandatory requirement of service of process contained in the first portion of Section 12, of the 1947 Act, we are of the opinion that the last paragraph thereof should be construed as intended to cover cases of inadvertence, or, in particular, where the names of owners and claimants are not known, and not as nullifying the requirement of service aforesaid. By giving to

this portion of the section this construction, we reconcile, to some extent, the apparent inconsistency aforesaid.

In the brief filed by the Attorney General for the State, it is assumed that a violation of the supposed compact between the Commonwealth of Virginia and this State, and Section 1 of Article XIII of our Constitution, lies in the fact that under Chapter 117, Acts of the Legislature, 1941, dispensed with the requirement theretofore existing that before property could be returned delinquent, it must appear from the affidavit of the sheriff, attached to the delinquent list, that the taxes assessed could not be collected from the personal estate of the taxpayer, constituted the sole violation of the supposed compact, and constitutional provision. We have treated the matter in a much broader aspect, being of the opinion that the trial court had it in mind that the supposed compact and constitutional provision had been violated in many other respects. However this may be, the same question was raised in *State* v. *Farmers Coal Co., supra,* and was dealt with by this Court in the way of dicta. We there said:

> "The first of these questions is that raised in the opinion of the trial court, in which it holds as illegal the returning of real estate delinquent, without a diligent effort to resort to the personal property of the owner for the taxes assessed against such real estate. We have read the very interesting and instructive discussion of the trial court upon the general policy of the law, covering a period of more than 700 years, to make personality the primary fund for payment of debts and taxes, to the end that the ownership of land may be preserved and protected to the widest extent possible. We do not question this policy, although it has been somewhat relaxed in modern times. The right of the owner of land to pledge it for debt by contract is universally recognized. Taxes are by statute made a lien upon real estate, and it is made the duty of the owner of real estate to return it for assessment, and to pay the taxes assessed thereon. When he fails to perform that duty, he becomes a delinquent, which gives rise to the right of the State, for itself and its subdivisions, to enforce

BLEED THROUGH—POOR COPY

said lien by sale of the land, the first step in such enforcement being a declaration of delinquency, even though the right to resort to personal property for such taxes still exists. Land is, under our law, made liable for the debts of the owner, although as to landowners who die intestate personal property must be first applied to existing indebtedness to the relief of the real estate; and ordinarily suits may not be instituted to sell lands for the benefit of creditors until there has been a return of execution 'No property found.' However, this requirement does not exist beyond two years from the date of a judgment, and after that time the lien of the judgment may be asserted against real estate without the issuance of an execution.

"The wisdom of what the Legislature did in enacting Section 11, Article 2, Chapter 117, Acts of the Legislature 1941, cannot be considered by this Court. The question involved is one of legislative power. It may be that a strict application of the common law would sustain the trial court's position on this question; but, unless restricted by the Constitution, the Legislature may change the common law at any time it sees fit. Section 21, Article VIII of our Constitution provides: 'Such parts of the common law, and of the laws of this State as are in force when this article goes into operation, and are not repugnant thereto, shall be and continue the law of the State until altered or repealed by the Legislature.' We think the Legislature had the power to prescribe the form of the oath of the sheriff required to be affixed to a delinquent list so as to relieve the sheriff of being required to swear that he had used due diligence, without success, to find property within his county subject to levy for taxes."

We need only add that we can conceive of no prejudice to the owner of land, when the State waives its right to collect taxes due thereon out of his personal property. Debtors do not usually complain when their creditor yields some of his rights respecting the collection of his debt. We think the Legislature had full power to provide for the

collection of taxes out of the land taxed, without resort to the personal property of the landowner, if it thought it wise to do so; and we do not think the landowner can complain of legislative leniency in this respect. Furthermore, it is not improper to say that the two tracts of land proceeded against of which appellees are the former owners, were each returned delinquent prior to the enactment of Chapter 117 of the Acts of 1941, and the same situation applies to all of the other tracts proceeded against, except the three tracts sold in the years 1942 and 1943, after Chapter 117 was enacted. We adhere to our holding in *State* v. *Farmers Coal Co., supra,* and make it a point of decision in this case.

We hold, therefore: (1) That when the real estate proceeded against in this cause became irredeemable on the 1st day of July, 1947, the former owner, and all persons having an interest in, or liens upon said land, lost all their right, title and interest therein, and the said land became the absolute property of the State; (2) that under the Constitution of this State a judicial proceeding is necessary to sell said lands under the provisions of Section 4, Article XIII of our Constitution, and that in said proceeding the Legislature has the power to provide for such sale without making the former owner or other interested persons therein a party thereto; (3) that the provisions of Sections 11 and 12, Chapter 160, Acts of the Legislature, 1947, providing that former owners, and other interested persons, be made parties to such proceeding, and requiring the service of process on parties defendant, and an entry of an order of publication as to those not served, constitutes only an act of grace on the part of the State, and not an act required by Section 4 of Article XIII of the Constitution of this State; (4) that Chapter 95, Acts of the Legislature, 1882, providing for a judicial proceeding for the sale of lands returned delinquent for the nonpayment of taxes, did not operate to create a contract between the State of West Virginia and the owners of the land, and that the enactment of Chapter 160 of the Acts of 1947, in so far as it may have changed the proceeding provided for in the Acts of 1882 aforesaid, was within the power of the Legislature and is constitutional and valid; (5) that Chapter 160, Acts of 1947, afore-

BLEED THROUGH—POOR COPY

said, requiring the service of process on all parties to the proceeding therein providing for, if within the jurisdiction of the court in which such proceeding or suit is instituted, is valid and binding on the Circuit Courts of the various counties of the State, and that such courts have the power and, in our opinion, are charged with the duty of requiring the service of such process on all persons residing in this State, who can be located and served; and (6) that Chapter 160 of the Acts of 1947, does not violate the provisions of Section 10, Article I of the Constitution of the United States, nor Section 1 of Article XIII of the Constitution of this State, and is valid and binding upon the courts of this State.

We, therefore, reverse the decree of the Circuit Court of Webster County, dismissing plaintiff's bill, and remand this cause to that court, with directions that the same be reinstated on the docket thereof, and that the cause be hereafter proceeded with in accordance with this opinion, and as such cases are required to be proceeded with in courts of equity.

Judge Lovins reserves the right to file a concurring opinion.

Reversed and remanded with directions.

Filed March 8, 1949.

B. B. Jarvis,
Clerk of the Supreme Court of Appeals
of West Virginia.

State v. Gray, et al.—No. 10113

Lovins, *Judge*, concurring:

I agree with the decision of the Court and the result reached in all respects except as to that part of the opinion holding that Section 12, Chapter 160, Acts of the Legislature, Regular Session, 1947, is mandatory in requiring the service of process on former owners and other named defendants. Such proposition is embodied in the latter portion of point 4, and in point 7, of the syllabus herein.

As to the same, as well as to those portions of the opinion wherein that proposition is discussed, I disagree.

In the first place I do not believe that either point 7 or point 4 of the syllabus can be treated as questions for decision in this case. It is to be pointed out that only two of the defendants herein contest this proceeding as instituted by the State. As the opinion of the Court states, each of those two defendants "made a general appearance", filing their separate demurrers. It is from the action of the trial court on such demurrers that this appeal was granted.

It is too well settled to require citation of authorities that a general appearance waives, and thereby cures, all defects in process, as well as all defects in the service thereof. Such being the case, questions relating to the validity of the process herein and the validity of the service thereof, do not and can not arise on this appeal. Accordingly, it is my opinion that those portions of the opinion of the Court wherein Section 12, idem, is discussed, are essentially obiter, and should not be included in points of the syllabus herein.

But, treating the question of the validity of either the process or the service thereof as a point of decision herein, I disagree with the opinion of the Court thereon. I think that under the guise of interpreting and construing Section 12, idem, this Court has attributed to the Legislature an intent which, by the farthest stretch of the imagination, can not be read therein. On the other hand, I think that the Legislature has clearly and unequivocally stated its intention with reference to the requirement of process, and the service thereof, by stating "• • • that failure to name any such person as a defendant, or failure to serve the summons on any named defendant, shall in no wise affect the validity of any of the proceedings in the suit • • • ." Section 12, idem.

Without further belaboring the point, my position thereon is fully supported by the action of the Legislature, subsequent to the decision of this Court herein, in the enactment of Chapter ...., Acts of the Legislature, Regular Session, 1949. That Act, which was introduced on March 9,

BLEED THROUGH—POOR COPY

1949, as Senate Bill No. 276, was passed by the Senate March 9, 1949, and by the House of Delegates on March 11, 1949. The Act, which is effective from passage, was approved and signed by the Governor on March 18, 1949, and, in my opinion, is now the law of this State. In amending and reenacting Section 12, idem, said Act eliminates the form of summons, the provision relating to service thereof, and thus removes the basis for that part of the opinion herein with which I disagree. The Act provides, among other things, as follows:

"• • • in view of the further fact that all parties known and unknown who may claim an interest in any of the lands included in the suit are given notice thereof by the order of publication provided for above; therefore, the Legislature deems it both expedient and necessary to provide that failure to name any such person as a defendant shall in no wise affect the validity of any of the proceedings in the suit for the sale of the state's title to such land; and in view of the fact that the supreme court of appeals in a decision just rendered has held that there is no constitutional requirement that the former owner or any other interested person be personally served with the process in a suit for the sale for the benefit of the school fund of lands that are and must be the absolute property of the state; and in view of the further fact that in its last previous enactment of this section the Legislature had no intention of requiring that personal service of process on named defendants in such a suit should be a mandatory condition precedent to the validity of any step or proceeding in such suit, but on the contrary expressly stated that failure to serve the summons on any named defendant should in no wise affect the validity thereof; now therefore, the Legislature also deems it both expedient and necessary to provide that the failure to obtain such personal service on any named defendant in any suit instituted under the provisions of this article prior to the effective date hereof shall in no way affect the validity of any step or proceeding in any such suit or the validity of the title acquired by the purchaser of land sold under any decree made or to be made in any such suit."

I regard the action of the Legislature in this respect a succinct and apropos. Accordingly, this concurrence i written.

I am authorized to say that Judge Riley joins in this con currence.

Filed March 29, 1949.

B. B. JARVIS,
Clerk of the Supreme Court of Appeals
of West Virginia.

(4540)

BLEED THROUGH—POOR COPY

FILE COPY

No. 326

Office - Supreme Court
FILED
SEP 1) 194

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

JERRY M. GRAY, et al.,
Appellants,

v.

THE STATE OF WEST VIRGINIA,
Appellee.

APPELLANTS' BRIEF OPPOSING "MOTION OF THE STATE OF WEST VIRGINIA TO AFFIRM THE JUDGMENT BELOW OR DISMISS THE APPEAL IN THE ABOVE ENTITLED CAUSE", PURSUANT TO PARAGRAPH 3, RULE 12, AND PARAGRAPH 3, RULE 7 OF THE RULES OF THE SUPREME COURT.

BROOKS B. CALLAGHAN,
CLARENCE E. MARTIN,
CLARENCE E. MARTIN, JR.,
Attorneys for Appellants.

BLEED THROUGH- POOR COPY

INDEX

PAGE

Summary Statement 1

Argument

I. Legislative Forfeiture 2

II. Equity of Redemption Impaired 5

III. Interstate Compact Impaired 7

IV. Right to Surplus Proceeds Impaired 9

CASES CITED

Bronson v. *Kenzie*, 1 Howard 316 6

Green v. *Biddle*, 8 Wheat. 1 8

Hawkins v. *Barney's Lessee*, 5 Pet. 457, 8 L. Ed. 190 9

Kentucky Union Co. v. *Kentucky*, 219 U. S. 209, 55 L. Ed. 183, 31 Sup. Ct. 171 9

King v. *Mullins* (1898) 171 U. S. 404, 18 S. Ct. 925, 43 L. Ed. 214 4

Sims v. *Fisher* (1943) 125 W. Va. 512, 25 S. E. 2d 216 8

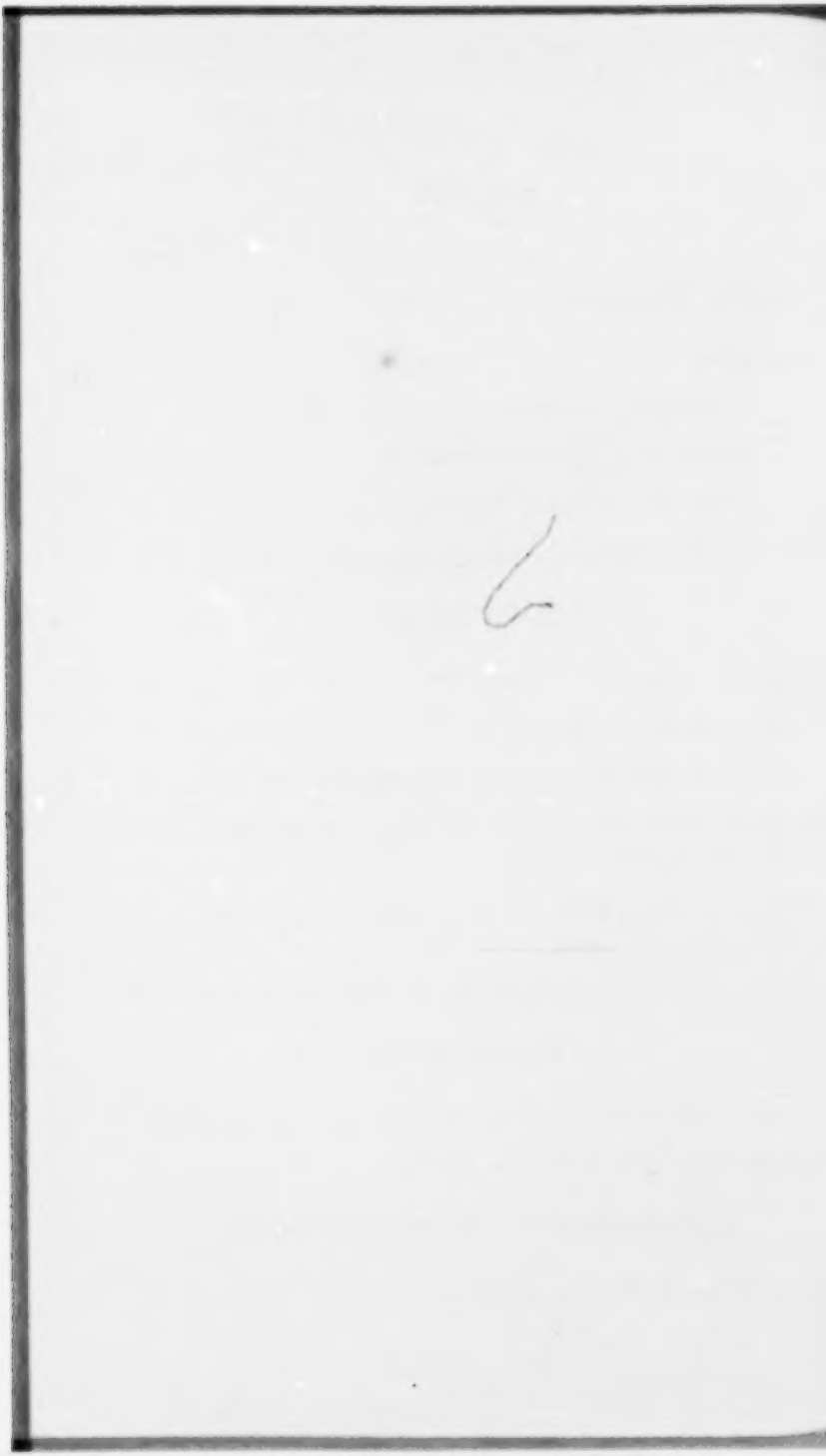
STATUTES CITED

Chapter 160, Acts of W. Va. of 1947 2

Chapter 134, Acts of W. Va. of 1949 3

CONSTITUTIONAL PROVISIONS CITED

Constitution of W. Va., Art XIII, Sec. 4 3



BLEED THROUGH- POOR COPY

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

JERRY M. GRAY, et al.,
Appellants,

v.

THE STATE OF WEST VIRGINIA,
Appellee.

APPELLANTS' BRIEF OPPOSING "MOTION OF THE STATE OF WEST VIRGINIA TO AFFIRM THE JUDGMENT BELOW OR DISMISS THE APPEAL IN THE ABOVE ENTITLED CAUSE", PURSUANT TO PARAGRAPH 3, RULE 12, AND PARAGRAPH 3, RULE 7 OF THE RULES OF THE SUPREME COURT.

SUMMARY STATEMENT

Neither the motion nor the statement opposing jurisdiction filed by the appellee herein claims that the Supreme Court of the United States lacks jurisdiction to grant or hear this appeal, but only that "the record made in this case presents no substantial federal question", thus appealing to discretionary power of the Court to refuse to hear this appeal. The only point to be answered, therefore, is whether the questions presented are substantial, thus justifying the Court in proceeding to hear the appeal already granted.

We will now consider the grounds in the order assigned by the appellee's motion.

ARGUMENT

I

The appellee's statement is as follows:

> "The ground of jurisdiction as stated by appellants which relates to an alleged violation of the Fourteenth Amendment of the Constitution of the United States, in that appellants were denied an opportunity in a judicial proceeding to contest the validity of the State's title to the lands included in this suit and sought to be sold in the names of appellants as former owners, is improperly asserted since as appears from the record made in this case appellants were served by publication and made a general appearance thereby waiving service of process."

This statement, especially when read in the light of appellee's "Statement Opposing Jurisdiction", which actually is drafted as a brief in support of the motion, misconceives and omits the most serious and substantial feature of this ground of jurisdiction. In order that this feature may clearly appear, let us admit for the moment, for the sake of argument only, that Chapter 160, Acts of West Virginia of 1947, provides notice and opportunity to be heard in a judicial proceeding sufficient, when considered alone, to satisfy due process—but what benefit are these after the state has already, by Section 12, seized, confiscated and appropriated unto itself the "absolute title" and declared that "the former owner . . . has no further interest therein nor rights in respect thereto". After such a legislative forfeiture, the so-called notice, the so-called opportunity to be heard and the so-called judicial proceeding are but empty jestures toward constitutional pro-

BLEED THROUGH—POOR COPY

cess. It is submitted that under this legislative forfeiture the State can even claim immediate possession of the land and have an action of ejectment or unlawful detainer to oust the owner.

The appellee's "Statement Opposing Jurisdiction" points to Section 19 of the statute involved which authorizes persons substantially interested to come into the suit and ask for a dismissal under certain circumstances. But how can the court protect them when the court is bound by the statute declaring absolute title in the state and no right or interest in the former owner? Or for that matter, how could there be "any person substantially interested" after this legislative forfeiture has operated?

It should be noted that the West Virginia Constitution, Article XIII, Section 4, does not require that the State must have "absolute title" before it sells for its taxes; nowhere does it even use the term "absolute title". The language of the Constitution is that the title "become irredeemable, not redeemed, released, transferred or otherwise disposed of". This laguage gives plenty of room for all rights claimed for the owner, but the legislative declaration of forfeiture of "absolute title" does not.

On the subject of notice alone, the court below made it a point of decision as to these appellants. So it cannot be dropped here. Great stress is laid by appellee, in its "Statement Opposing Jurisdiction", that in the majority opinion below the court held that personal service on resident former owners is mandatory under Section 12. But the appellee failed to note that the W. Va. Legislature by Chapter 134, Acts of 1949, enacted *retroactively* that resi-

dent owners need not be named or personally served, and even dropped the form of summons for personal service on resident former owners, thus approving a publication without naming the party as sufficient notice on resident owners. Consequently, notice alone becomes a substantial federal question.

In *King* v. *Mullins* (1898) 171 U. S. 404, 18 S. Ct. 925, 43 L. Ed. 214, this Court was required to pass upon the due process of the statutes of West Virginia of 1882 amended through 1893, on this same subject. This Court held that these statutes did not violate due process because, as we understand the decision, the statutes provided:

> 1. "That the sale should be sought by petition filed by the commissioner of school lands in the proper circuit court, to which proceeding all claimants should be made parties, and be brought in by personal service of summons upon all found in the county, or by publication as to those who could not be found."
>
> 2. "That every such suit brought under the provisions of this chapter, the court shall have full jurisdiction, power and authority to hear, try and determine all questions of title, possession and boundary which may arise therein, as well as any and all conflicting claims whatever to the real estate in question arising therein."
>
> 3. "It thus appears that under the statutes of West Virginia in force after 1882 the owner of the forfeited lands had the right to become a party to a judicial proceeding, of which he was entitled to notice, and in which the court had authority to relieve him, upon terms that were reasonable, from the forfeiture of his lands."

BLEED THROUGH—POOR COPY

> 4. "If the state was not entitled to treat them as forfeited lands, that fact could be shown in the proceeding instituted for their sale as lands of that character, and the rights of the owner fully protected."

Now, Chapter 160 here involved does not afford the above protection to the former owner because he has been foreclosed in advance by the legislative declaration of forfeiture. Thus the federal question is substantial indeed and the King case is authority that due process is lacking.

II

The appellee's statement is as follows:

> "The ground of jurisdiction as stated by appellants which relates to an alleged violation of the obligation of contract in contravention of Section 10 of Article I of the Constitution of the United States, is improperly asserted in that the facts and record made in this case present no contract."

Again, this is an understatement. Our position is and always has been that the right of redemption is not only a contractual right but also a property right incident to the land and that under the W. Va. Constitution the right must be afforded.

Section 12 of Chapter 160 attempts to legislate the right or equity of redemption into "such privilege of redemption as may be extended to him by the legislature as an act of grace". In other words, grace may be exercised or it may not. If it is not, there is no right of redemption. But in the King case the right of redemption was

considered most important in sustaining the Act of 1882.

Appellee goes further (Statement Opposing Jurisdiction, page 10) and asserts, "if a contract did exist, the obligation thereof would not be impaired by the alteration of a purely remedial right". But this court said in *Bronson* v. *Kenzie*, 1 Howard 316:

> "Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself. In either case it is prohibited by the Constitution. This subject came before the Supreme Court in the case of *Green* v. *Biddle*, 8 Wheat. 1. * * * On the part of the demandant in that case, it was insisted that the laws of Kentucky passed in 1797 and 1812 concerning occupying claimants of land impaired the obligation of the compact made with Virginia in 1789. On the other hand it was contended that these laws only regulated the remedy, and did not operate on the right to the lands. In deciding the point the Court says: 'It is no answer that the acts of Kentucky now in question are regulations of the remedy and not of the right to the lands. If these acts so change the nature and extent of the existing remedies as materially to impair the rights and interests of the owner, they are just as much a violation of the compact as if they directly overturned his rights and interests.' And, it should not be overlooked, it was due to a stable remedy afforded by statute to the former owner at the time of the forfeiture, that sustained our constitutional forfeitures. *King* v. *Mullins*, 171 U. S. 422, 427 and 434."

BLEED THROUGH—POOR COPY

III

The appellee's statement is:

> "The ground of jurisdiction as stated by appellants which relates to an alleged violation of an alleged contract or compact between the Commonwealth of Virginia and the State of West Virginia, is improperly asserted since the alleged contract or compact does not impose any limitation or restriction on the taxing power of the State of West Virginia."

This proposition is treated in the appellee's motion and statement and in the opinion of the court next below as some sort of attack upon the sovereignty of the state. But surely it is no surrender of sovereignty for a state to perform or be required to comply with its agreements.

This Court, in the King case above, plainly held that West Virginia is bound by that contract or compact in the following language:

> "The constitution of West Virginia provides that all private rights and interests in lands in that state derived from or under the laws of Virginia, and from or under the constitution and laws of West Virginia, prior to the time such constitution went into operate, should 'remain valid and secure, and shall be determined by the laws in force in Virginia prior to the formation of this state, and by the constitution and laws in force in this state prior to the time this constitution goes into effect.'
>
> "In view of this provision, it is proper to look at the legislation of Virginia and the decisions of its highest court touching the forfeiture of lands

> for noncompliance by the owners with the requirements of the law relating to taxation."

This Court held a similar compact between Virginia and Kentucky to be a binding agreement in *Green* v. *Biddle*, 8 Wheat. 1.

And the same thing has been held by West Virginia's highest court in *Sims* v. *Fisher* (1943) 125 W. Va. 512, 25 S. E. 2d 216, as follows:

> "Thus the law stood at the date of the formation of this State. Article IX of our Constitution of 1863, relating to forfeited and unappropriated lands, provided by Section 1 that private rights and interests in lands shall be determined by the laws theretofore in force in the State of Virginia . . ."

Now, just how far that contract or compact imposes a "limitation or restriction on the taxing power of the State of West Virginia" seems to us to be a very substantial federal question. It is so substantial in fact that this court must reverse its holdings in *Green* v. *Biddle*, *King* v. *Mullins* and *Bronson* v. *Kenzie* (supra) before it comes in agreement with appellee that "the alleged contract or compact does not impose any limitation or restriction on the taxing power of the State of West Virginia".

Just how much limitation, we believe is a subject for briefing, arguing and deciding on the merits—not on demonstrating a substantial ground of federal jurisdiction.

But we should add that we cannot subscribe to the proposition that compliance puts West Virginia in a condition of "serfdom", "bondage" or "vassalage" as con-

tended by appellee. West Virginia was collecting its taxes from 1882 to 1941 and in compliance with this agreement as held by this Court in the King case.

The appellee (Statement Opposing Jurisdiction, pages 12 and 13) places great stress upon excerpts from *Hawkins* v. *Barney's Lessee*, 5 Pet. 457, 8 L. Ed. 190, and *Kentucky Union Co.* v. *Kentucky*, 219 U. S. 209, 55 L. Ed. 183, 31 Sup. Ct. 171. But these two cases do not repudiate the compact between Virginia and Kentucky, nor do they hold that the contract is not binding—they hold the very contrary. But the burden of these two decisions is as to how far the compact is binding. And the holdings are that the new state is not restricted to the same language or the same insignificant detail, the same periods of limitations, etc., as the original statutes of the mother state. But these two cases make it clear that *Green* v. *Biddle* (supra) is still the law where "substantial rights incident to the title" are concerned.

IV

The appellee's statement is:

> "The right to surplus proceeds of sale accorded by Section 5 of Article XIII of the Constitution of West Virginia is not a vested right in the title to lands sold to the State for taxes or forfeited for non-entry for taxation and the acquisition by the State of absolute title to lands sold for taxes or forfeited for non-entry for taxation does not deprive the former owners of any property rights protected by the Fourteenth Amendment to the Constitution of the United States."

This right to surplus proceeds cannot be treated that lightly. West Virginia's own highest court in *Sims* v. *Fisher* (supra) had this to say about it:

> "But we think this right in the former owner, being constitutional under Section 5, Article XIII, furnishes a basis for the claim that the former owner is entitled to have the land, out of which he may expect something from the surplus, sold under the most favorable conditions. The general rule, as is well known, is that real estate is not usually sold in a judicial proceeding until the liens thereon are first ascertained and decreed; and that is a rule that may well be applied in the sale of land for the benefit of the school fund, to the extent that all questions of the right to sell the land be settled in advance of sale. The absolute right of the State to sell lands as forfeited and delinquent is, we think, limited to this extent and so limited by the Constitution."

Surely a very casual examination of Chapter 160 will show that the type of notice, the type of opportunity to be heard and the type of judicial proceeding afforded do not give the owner the protection for the owner's right to the surplus required by *Sims* v. *Fisher* (supra).

Whether this right is an interest in the title to the land or whether it is personalty would seem to be beside the point. Each specie of property has due process protection.

CONCLUSION

A great deal more might well be written on each of the above points. But we have tried not to repeat our State-

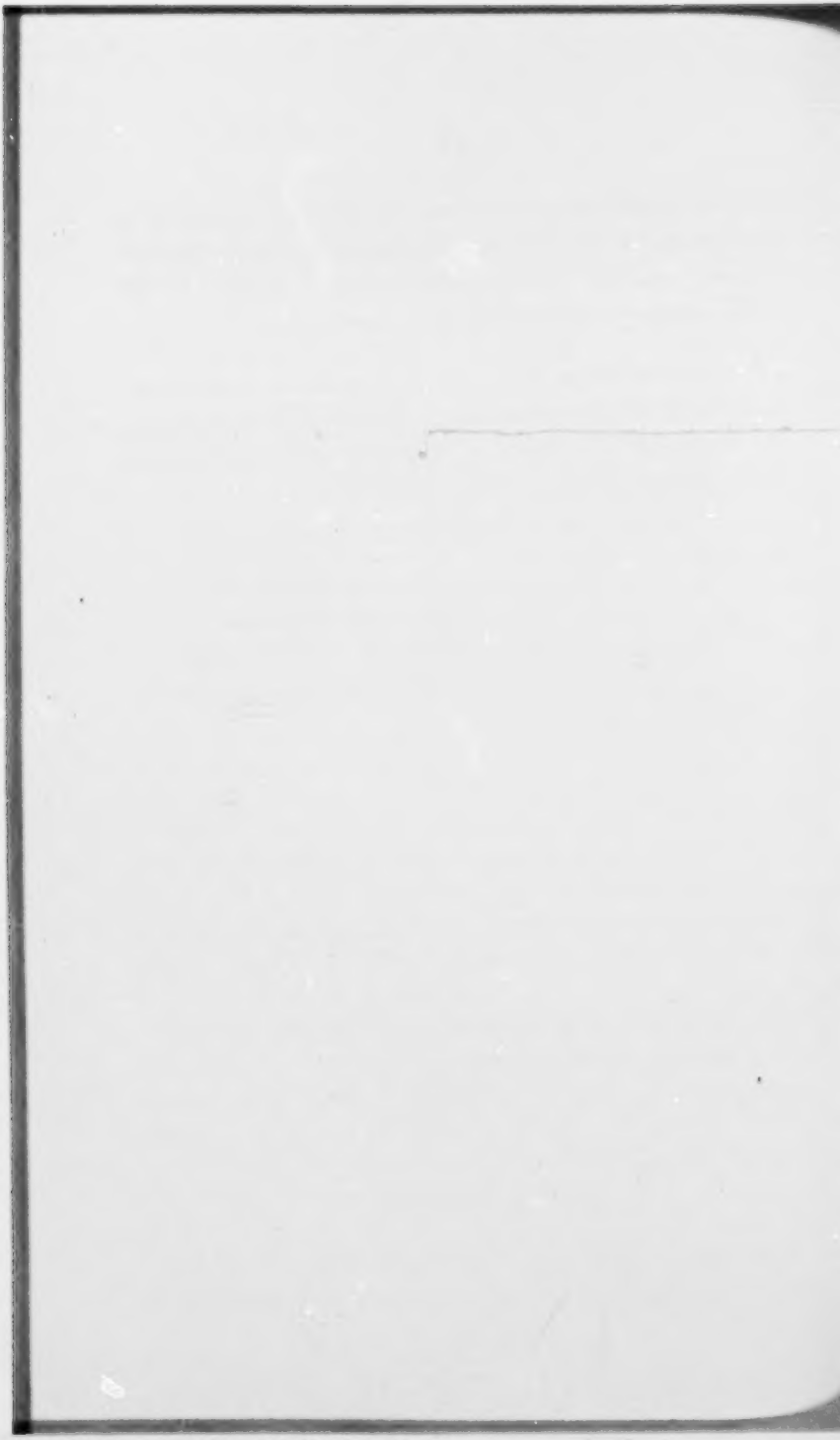
BLEED THROUGH—POOR COPY

ment of Jurisdiction. And likewise we have tried not to brief the merits beyond what is necessary for jurisdictional purposes, leaving a full treatment of the merits for the proper stage on this appeal.

It is insisted that, from our Statement of Jurisdiction, from this brief and even from the record itself, the substantial nature of the federal questions readily appear, and that appellee's motion should be denied.

Respectfully submitted,

BROOKS B. CALLAGHAN,
CLARENCE E. MARTIN,
CLARENCE E. MARTIN, JR.,
Attorneys for Appellants.



BLEED THROUGH- POOR COPY

FILE COPY

FILED
SEP 1 0 194
CHARLES ELMORE C
O

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 326

JERRY M. GRAY, ET AL.,

Appellants,

vs.

THE STATE OF WEST VIRGINIA,

Appellee

APPEAL FROM THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

IRA J. PARTLOW,
Attorney General of the State of West Virginia;
WILLIAM C. MARLAND,
Assistant Attorney General of the State of West Virginia;
JOHN C. VANCE,
Special Assistant Attorney General of the State of West Virginia;
Counsel for Appellee

BLEED THROUGH-POOR COPY

INDEX

Subject Index

	Page
Statement opposing jurisdiction	1
Motion to dismiss or affirm	19

Table of Cases Cited

Baker v. *State Land Office*, 294 Mich. 587, 293 N. W. 763	10
Blooming Rose Coal Co. v. *White*, 128 W. Va. 502, 37 S. E. (2d) 455	10
Butler v. *Palmer*, 1 Hill (N. Y.) 324	10
Hawkins v. *Barney's Lessee*, 5 Pet. 457, 8 L. ed. 190	13
James Alexander, Inc. v. *United States*, 128 Fed. (2d) 82	10
Kentucky Union Co. v. *Kentucky*, 219 U. S. 140, 55 L. ed. 183, 31 S. Ct. 171	14
Mercury Herald Co. v. *Moore*, 22 Cal. (2d) 269, 138 P. (2d) 673	10
Messer v. *Lang*, 129 Fla. 546, 176 So. 548	10
Muirhead v. *Sands*, 111 Mich. 487, 69 N. W. 826	10
Sims v. *Fisher*, 125 W. Va. 512, 25 S. E. (2d) 216	8
State v. *Blevins*, 48 S. E. (2d) 174	10
State v. *Farmers Coal Co.*, 130 W. Va. 1, 43 S. E. (2d) 625	9, 16
State National Bank v. *Morthland*, 196 Ark. 346, 118 S. W. (d) 266	10
Wiant v. *Hays*, 38 W. Va. 681, 18 S. E. 807	17

Statutes Cited

Acts of the West Virginia Legislature, 1941, Chapter 117	8
Acts of the West Virginia Legislature, 1945, Chapter 140	8
Acts of the West Virginia Legislature, 1947, Chapter 160	1, 2, 3, 5, 9, 11, 12, 17

Page

Constitution of the United States:

Article I, Section 10 20
14th Amendment 2, 17, 19, 21

Constitution of West Virginia:

Article 9, Section 1 11

Article 13:

Section 1 12
Section 4 ..... 16, 17
Section 5 ..... 16, 20

Cooley on Taxation, 4th Edition, Section 1561 9

BLEED THROUGH—POOR COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 326

JERRY M. GRAY, ET AL.,

Appellants,

vs.

THE STATE OF WEST VIRGINIA,

Appellee

STATEMENT OPPOSING JURISDICTION

I

On the 28th day of July, 1948, a bill of complaint was filed by the Deputy Commissioner of Forfeited and Delinquent Lands of Webster County, West Virginia, in the Circuit Court of the aforesaid county, seeking a decree that certain lands named in the bill, including those formerly owned by appellants, be sold for the benefit of the West Virginia school fund pursuant to the provisions of Chapter 160, Acts of the Legislature of West Virginia, 1947. Appellants were served by publication and made a general appearance interposing a demurrer to the bill of complaint. Appellants now assert as a ground of Federal jurisdiction that they were denied due process of law, in that they were not ac-

corded an opportunity in a judicial proceeding to contest the validity of the State's title to the lands sought to be sold in their names as former owners. They allege as a ground of Federal jurisdiction that the last paragraph of Section 12 of Chapter 160 contravenes the Fourteenth Amendment to the Constitution of the United States. This paragraph is as follows:

> "In view of the fact that the state has absolute title to all forfeited land, to all land sold to the state for nonpayment of taxes and become irredeemable, to all escheated land, and to all waste and unappropriated land, and must under the constitution have such an absolute title before the land may be sold for the benefit of the school fund; and in view of the fact that the former owner of any such land, or any person claiming under him, has no further interest therein nor rights in respect thereto except such privilege of redemption as may be extended to him by the Legislature as an act of grace; and in view of the further fact that all parties known and unknown who may claim an interest in any of the lands included in the suit are given notice thereof by the order of publication provided for above; therefore, the Legislature deems it both expedient and necessary to provide that failure to name any such person as a defendant, or failure to serve the summons on any named defendant, shall in no wise affect the validity of any of the proceedings in the suit for the sale of the state's title to such land."

They assert that this statute denies them due process of law, in that it fails to provide notice and opportunity to be heard in a judicial proceeding. Since appellants were served by publication and appeared generally, thereby waiving service of process, the question of notice is, of course, utterly extraneous as to them. Furthermore, the Supreme Court of Appeals of West Virginia in this case has construed Section 12 to require not only service by pub-

BLEED THROUGH—POOR COPY

lication, but personal service on all former owners of lands sought to be sold pursuant to the provisions of Chapter 160. The entire provisions of Section 12 are as follows:

"The summons in such suits shall be in form and effect as follows:

SUMMONS IN CHANCERY

STATE OF WEST VIRGINIA:

To the Sheriff of ——— County, Greetings:

You are hereby commanded in the name of the state of West Virginia to notify ———
(Here list all defendants in the suit.)
———
——— that the state of West Virginia has instituted a suit for the sale, for benefit of the school fund, of the lands listed in a notice of the institution of such suit soon to be published in one or more newspapers in the county pursuant to an order of publication, and you are further commanded to summon each of the persons named above, if he be found in your bailiwick, to appear before the judge of the circuit court of ——— County, at rules to be held in the clerk's office of such court on the first Monday in——— next, to answer the bill in chancery of the state of West Virginia, exhibited therein against him, and show cause, if any there be, why a decree should not be entered for the sale of such land or lands in respect to which he claims any interest, and have then and there this writ.

Witness: ——— ———, Clerk of the circuit court of ——— County, at the courthouse thereof, on this the ——— day of ———, 19—, and in the ——— year of the state.

———, Clerk.
By ———, Deputy.

"The summons shall be served on the named defendants in the manner provided by law for the service of process in other chancery suits. For serving the sum-

mons the sheriff shall be paid the fee provided by law for service of process in other chancery suits, and the costs thereof shall be taxed to the state as part of its costs in the suit and paid as hereinafter provided.

"The clerk of the circuit court shall at the same time that he issues such summons enter an order of publication, without the filing of any affidavit by the deputy commissioner as required in other cases. Such order of publication shall give the style of the suit, as, State of West Virginia v. A. B., *et al.*; shall state that the object of the suit is to obtain a decree of the circuit court ordering the sale for the benefit of the school fund of all lands included in the suit; shall list all such lands, setting forth as to each item its local description, the former owner in whose name the land was forfeited, or was returned delinquent and sold, or escheated, as the case may be, and the names of such other defendants as may be interested therein; and shall require all the named defendants, and all unknown parties who are or may be interested in any of the lands included in the suit to appear within one month after the date of the first publication thereof and do what is necessary to protect their interests.

"The order shall be published once a week for three successive weeks in two newspapers of opposite politics published in the county, if such there be; otherwise, this requirement shall be satisfied by such publication in any one newspaper published in the county, and if no newspaper is published in the county, or if none therein will publish the order at the legal rate or for the time required, then in such newspaper of general circulation in the county as the clerk of the court in which the cause is pending may direct. The costs of such publication shall be at the rate provided for in section thirty-four, article one, chapter fifty-nine of this code, shall be charged ratably to each item listed in the suit, and shall be taxed to the state as part of its costs in the suit and paid as hereinafter provided.

"In view of the fact that the state has absolute title to all forfeited land, to all land sold to the state for

BLEED THROUGH—POOR COPY

nonpayment of taxes and become irredeemable, to all escheated land, and to all waste and unappropriated land, and must under the constitution have such an absolute title before the land may be sold for the benefit of the school fund; and in view of the fact that the former owner of any such land, or any person claiming under him, has no further interest therein nor rights in respect thereto except such privilege of redemption as may be extended to him by the Legislature as an act of grace; and in view of the further fact that all parties known and unknown who may claim an interest in any of the lands included in the suit are given notice thereof by the order of publication provided for above; therefore, the Legislature deems it both expedient and necessary to provide that failure to name any such person as a defendant, or failure to serve the summons on any named defendant, shall in no wise affect the validity of any of the proceedings in the suit for the sale of the state's title to such land."

The apparent inconsistencies in this section were examined and passed on by the Supreme Court of Appeals in its decision in this case. The majority of the Court held that proper construction of this section makes mandatory not only service by publication, but personal service on all former owners of lands sought to be sold by the State pursuant to the provisions of Chapter 160. The Court stated:

"As we construe this statute, it is the mandatory duty of the State, in a suit instituted by it under Section 12 of Chapter 160, of the Acts of 1947, to secure the personal service of process on all named parties residing within the jurisdiction of the court in which the suit is instituted. It seems to us to be within the power of the circuit courts, and in our opinion, their duty as well, to require process to be served on all persons within their jurisdiction. It is not necessary to comment on the undoubted power of the courts to make and enforce this requirement. In the case at bar, the appellees, the only parties appearing in the case, have

either been served with process, or by their general appearance in the cause, have waived that service, and they stand in court in the status of persons who have been served with process. The last sentence of Section 12 quoted above does not prejudice them, for the reason that they are in court with the right to make the defenses hereinbefore referred to, with the privilege or right of redemption, and the right to exercise the other privileges or rights which the statute gives them. In our opinion, Section 12, as a whole, is constitutional on the theory that, as so early held in *McClure* v. *Maitland, supra,* a former owner of land, or persons holding liens against same, have lost all their rights when the title to the land they own or had claim to became completely vested in the State. Even if this were not true, the question of the unconstitutionality of the last sentence of that section could only arise in a suit to sell such land, where there had been no process served on the former owner or other interested party, in a case where such process could be had. Giving to the Act this construction, we are unable to see where the appellees in this case have been deprived of any substantial right, assuming, for the sake of argument, they had any right in the land involved at the date of the institution of this suit. As to residents of this State, Circuit Courts of the several counties have it within their power to require the service of process on all defendants within their jurisdictions, and we will not assume that they will fail to exercise that power. When this is done there would seem to be little in which any former owner can complain. In making this holding, we follow the holdings of this Court under the Act of 1882, and make effective the legislative mandate."

It is respectfully submitted that the State Court's construction of this statute with respect to notice and service is controlling. Since appellants were served by publication and appeared generally, they, of course, cannot assert failure of due process as to them. Moreover, as stated above, the statute as construed by the Supreme Court of Appeals

BLEED THROUGH—POOR COPY

of West Virginia requires service by publication and personal service on all former owners whose lands are sought to be sold by the State.

As best we understand appellants' position, they seem to be further asserting that the statute contravenes the Fourteenth Amendment to the Constitution of the United States, in that it fails to provide an opportunity to contest the validity of the State's title, even though the former owners are required to be served both personally and by order of publication and given an opportunity to be heared in a judicial proceeding pursuant to the decree in which their lands shall be ordered sold or dismissed from suit as not subject to sale. This is utterly opposed to the whole spirit, purpose, and plain language of Chapter 160. The statute, of course, does not purport to give the circuit court jurisdiction to order any lands sold, other than those to which the State in fact has absolute title. Section 19 of the statute provides as follows:

> "Any person substantially interested may apply to the circuit court at any time before the sale for an order dismissing the suit for the sale of any land as to which he makes one or more of the following claims: (1) That all taxes due thereon were paid before sale to the state. (2) That the land was redeemed after sale to the state. (3) That the land has not escheated. (4) That the land has not been forfeited for nonentry. (5) That the land was sold to him at a former circuit court sale for the benefit of the school fund and has not thereafter been sold to the state for nonpayment of taxes nor forfeited for nonentry. (6) That he has acquired title to the land by transfer under the provisions of section three, article thirteen of the constitution. The application shall state briefly the facts on which the claim is based. The deputy commissioner may also apply for such an order whenever on any of these grounds, or because the land is nonexistent or the subject of a du-

plicate assessment, he is satisfied that the land should not be sold."

It is thus utterly clear that the former owners have full right to appear in the proceeding and offer any evidence they may so desire to contest the validity of the State's title. If the circuit court finds as a matter of fact that the State does not have absolute title, it is required to order the lands dismissed from the suit. The proceeding contemplated and required by the statute is, of course, a judicial, not an administrative proceeding, since the latter is not within the constitutional jurisdiction of the circuit courts of this State. It is, therefore, submitted that the stated ground of jurisdiction, in that appellants were denied due process of law because they were not afforded an opportunity to contest the validity of the State's title in a judicial proceeding, is premised on a cavalier disregard of the plain, unmistakable terms of the statute. Appellants were given notice and an opportunity to be heard and to offer such evidence as they might desire to contest the validity of the State's title to the lands sought to be sold in their names as former owners. Patently, they cannot, therefore, now assert that they were denied their day in court, and that the statute is repugnant to the Fourteenth Amendment to the Constitution of the United States.

II

In 1941, the laws relating to the sale of forfeited and delinquent lands for the benefit of the school fund were amended and reenacted by Chapter 117, Acts of the 1941 Legislature, and again amended and reenacted by Chapter 140, Acts of the 1945 Legislature. The 1941 Act was held unconstitutional by the Supreme Court of Appeals of West Virginia in the case of *Sims* v. *Fisher*, 125 W. Va. 512, 25 S. E. 2d 216, and the 1945 Act was held unconstitutional by the Supreme Court of Appeals of the State of West

BLEED THROUGH—POOR COPY

Virginia in the case of *State* v. *Farmers Coal Company*, 130 W. Va. 1, 43 S. E. 2d 625. Both of these statutes provided that the lands could be redeemed at any time until sale thereof by the State. In 1947, Chapter 160 was enacted, which statute provided that after July 1, 1947, all lands previously sold to the State for taxes or forfeited to the State for nonentry for taxation should be irredeemable until institution of suit for the sale of such lands, at which time they could again be redeemed. Appellants assert that their lands were sold to the State pursuant to a contract, one of the elements of which was the statutory right to redeem at any time until sale by the State, and that the temporary suspension of the right of redemption constituted a violation of the obligation of the aforesaid contract.

It is submitted that it is altogether clear that lands sold to the State for taxes are not sold pursuant to contract. The power of taxation operates *in invitum* and not by consent or agreement. Since the earliest times the State has employed summary remedies for the collection of taxes, one of which is the seizure of lands for failure to pay the taxes thereon. This seizure is patently an act of expropriation, agreeable and necessary to the State's inherent power to collect its taxes. This seizure does not derive from agreement with the individual landowner, and no contract with him can be implied. As stated in Cooley on Taxation, Fourth Edition, Section 1561:

> "• • • Lengthening the time within which the land may be redeemed, as applicable to tax-sales already made, is unconstitutional as impairing the obligation of a contract. The same rule, some have thought, should apply to a statute shortening the time to redeem; as it is equally unjust to legislate against the owner of the land in such circumstances as in his favor. But with him there is no contract when the sale is made, and the remedy by redemption which the statute gives him, like remedies in general, is subject to legislative discretion.

> Where lands are struck off to the state, there is unquestionable power in the legislature to favor or relieve the owner of the land to any extent it may see fit."

In *Mercury Herald Co.* v. *Moore*, 22 Cal. 2d 269, 138 P. 2d 673, it is stated:

> "It is contended that the termination of the right of redemption of the property here in question impairs the obligation of a contract. There is no contractual relationship, however, between the taxpayer and the state. • • • The position of the taxpayer is not that of a purchaser who enters into a contract with the state in purchasing the property. The taxpayer's own failure to pay the tax leads to the sale of the land as an exercise of the sovereign power to collect the tax. • • •"

Moreover, even if the lands in question were sold to the State pursuant to contract, the obligation of such contract would not be violated by a statute lessening the period of redemption, since the entire redemptive process is a mere matter of grace and, therefore, wholly remedial. In *Blooming Rose Coal Co.* v. *White*, 128 W. Va. 502, 37 S. E. 2d 455, the Court stated, in point 2 of the syllabus:

> "The right of redemption of lands purchased for and held by the State is a creature of statute and 'is an act of grace on the part of the state, which the Legislature has the right to destroy.' *Bank of Quinwood* v. *Becker*, 119 W.Va. 534, 551."

See further *State* v. *Blevins*, 48 S.E. 2d 174; *James Alexander, Inc.* v. *United States*, 128 Fed. 2d 82; *State National Bank* v. *Morthland*, 196 Ark. 346, 118 S.W. 2d 266; *Messer* v. *Lang*, 129 Fla. 546, 176 So. 548; *Muirhead* v. *Sands*, 111 Mich. 487, 69 N. W. 826; *Baker* v. *State Land Office*, 294 Mich. 587, 293 N. W. 763; *Butler* v. *Palmer*, 1 Hill (N.Y.) 324.

BLEED THROUGH—POOR COPY

It is, therefore, submitted that no contract exists between the State of West Virginia and appellants. It is submitted that even if a contract did exist, the obligation thereof would not be impaired by the alteration of a purely remedial right. It is therefore submitted that the stated ground of jurisdiction, in that Chapter 160 contravenes Section 10 of Article I of the Constitution of the United States, is without basis and presents no substantial federal question.

III

The admission of the State of West Virginia to the Union was preceded by the organization of the Restored Government of Virginia, the assembly of which adopted an ordinance on August 20, 1861, containing the following provision with respect to the security of land titles:

> "All private rights and interests in lands within the proposed state, derived from the laws of Virginia prior to such separation, shall remain valid and secure under the laws of the proposed state, and shall be determined by the laws now existing in the State of Virginia."

A proposed constitution was formulated by the assembly and submitted to the voters within the territory of the proposed new state and was ratified and adopted on May 3, 1862. Section 1 of Article 9 thereof provided as follows:

> "All private rights and interests in lands in this state, derived from or under the laws of the State of Virginia, prior to the time this constitution goes into operation shall remain valid and secure, and shall be determined by the laws heretofore in force in the State of Virginia."

The State was admitted into the Union on December 3, 1862, by an act of the Congress of the United States. A

new constitution was formed later and adopted in the year 1872. Section 1 of Article XIII thereof provides as follows:

> "All private rights and interests in lands in this State derived from or under the laws of the State of Virginia, and from or under the constitution and laws of this State prior to the time this constitution goes into operation, shall remain valid and secure and shall be determined by the laws in force in Virginia, prior to the formation of this State, and by the constitution and laws in force in this State prior to the time this constitution goes into effect."

This section has remained in unaltered form in the Constitution until this time.

Appellants assert that the above described provisions of the ordinance of 1861 and the above described constitutional provisions constituted a contract or compact with the Commonwealth of Virginia. They state that Chapter 160 impairs the obligation of that contract or compact, in that Chapter 160 departs from the laws in effect in Virginia at the time of separation, with particular emphasis on the fact that Chapter 160 dispenses with the necessity of proceeding first against the personal property of a delinquent landowner, as was required to be done under the laws of Virginia at the time of separation. Appellants reason that delinquent landowners are in some manner injured and harmed by the State's relinquishment of its right to proceed against personal property for the collection of land taxes.

The substance of appellants' position is that the sovereign State of West Virginia is in bondage to the Commonwealth of Virginia, and as a result of a condition of serfdom the State of West Virginia has no powers to legislate with respect to the collection of land taxes, except insofar as to reenact the laws in force in Virginia at the time of separation.

BLEED THROUGH—POOR COPY

The Commonwealth of Kentucky separated from the Commonwealth of Virginia pursuant to the obligation of a compact similar to the contract or compact which appellants assert exists between Virginia and West Virginia. Part of the terms of this compact were: "that all private rights and interest of lands within the said district, derived from the laws of Virginia, shall remain valid and secure under the laws of the proposed state, and shall be determined by the laws now existing in this state." In the case of *Hawkins* v. *Barney's Lessee,* 5 Pet. 457, 8 L. Ed. 190, this court had before it the question of the validity of a Kentucky statute which undertook to limit the right of bringing suits for the recovery of lands to seven years, instead of twenty, as was the case under the laws of Virginia at the time the compact was made. In sustaining the Kentucky act, this court stated:

> "* * * It can scarcely be supposed that Kentucky would have consented to accept a limited and crippled sovereignty: nor is it doing justice to Virginia to believe that she would have wished to reduce Kentucky to a state of vassalage. Yet it would be difficult, if the literal and rigid construction necessary to exclude her from passing this law were to be adopted; it would be difficult, I say, to assign her a position higher than that of a dependent on Virginia. Let the language of the compact be literally applied, and we have the anomaly presented of a sovereign State governed by the laws of another sovereign—of one-half the territory of a sovereign State hopelessly and forever subjected to the laws of another State. Or a motley multiform administration of laws, under which A would be subject to one class of laws, because holding under a Virginia grant; while B, his next door neighbor, claiming from Kentucky, would hardly be conscious of living under the same government.
>
> "If the seventh article of the compact can be construed so as to make the Limitation Act of Virginia

> perpetual and unrepealable in Kentucky, then I know not on what principle the same rule can be precluded from applying to laws of descent, conveyance, devise, dower, courtesy, and in fact every law applicable to real estate."

In the case of *Kentucky Union Co.* v. *Kentucky*, 219 U. S. 140, 55 L. Ed. 183, 31 Sup. Ct. 171, this court had before it the question of the constitutionality of a Kentucky act relating to the forfeiture of land titles for nonpayment of taxes. In sustaining the act and holding that it did not violate the aforesaid compact, this court stated:

> "We think the effect of these decisions is to declare that while the Virginia compact prevents the cutting down of the titles secured under the state of Virginia prior to its date, so as to take away substantial rights incident to the title, as was the case in Green *v.* Biddle, supra, it did not mean to prevent the state, upon notice and hearing, from requiring the registration of land titles for taxation, or, in default thereof, from forfeiting such titles to the state. These laws do not have the effect of taking away legitimate rights secured by the old grants, but enable the new sovereign to enforce against such lands, as well as others, the taxing laws of the state. It was, of course, recognized that the land would pass under the dominion of a new state, which would require revenues for its support, and while the title obtained from the state of Virginia was protected, it was not intended that it should be immune from constitutional laws having the effect to subject such lands to the taxing power of the new sovereignty, and to require their owners, by all proper methods, to contribute their share to the public burdens of the state."

We submit that these cases dispose of appellants' contention that the alleged contract or compact between Virginia and West Virginia served to emasculate the powers of the State of West Virginia to assess and collect its taxes. The

BLEED THROUGH—POOR COPY

proposition that the State of West Virginia shall forever be held in vassalage and chained to laws suited to conditions in Virginia prior to 1862 is unthinkable. The purposes of the compact between Virginia and Kentucky and the purposes of the ordinance of the Restored Government of Virginia and the West Virginia Constitution were the same. These purposes were to secure in honor and justice those private rights in lands which had vested under the laws of Virginia at the time of separation. The framers of the ordinance of the Restored Government of Virginia and the West Virginia Constitution cannot be charged with having intended to abdicate the sovereign powers of the new state to levy taxes and procure revenues indispensable to the maintenance of government. The provisions of the alleged contract or compact are utterly extraneous to, and impose no limitation on, the plenary powers of taxation vested in the sovereign state of West Virginia.

We submit that appellants' contention in the premises is without any reasoned basis whatever. In addition to the gross misconstruction of the purposes and plain import of the ordinance of the Restored Government of Virginia and the West Virginia Constitution, the assertion that delinquent landowners are prejudiced by the failure of the State to proceed against their personal properties is meaningless. Debtors do not ordinarily allege injury when a creditor abjures one of the remedies for the collection of the debt.

For the reasons aforesaid, it is submitted that the provisions of the alleged contract or compact between Virginia and West Virginia are wholly inapplicable to the facts of this case, and that the alleged violation thereof is therefore without basis or reason and presents no substantial federal question.

IV

Section 4 of Article XIII of the Constitution of West Virginia provides as follows:

> "All lands in this State, waste and unappropriated or heretofore or hereafter for any cause forfeited, or treated as forfeited, or escheated to the State of Virginia, or this State, or purchased by either and become irredeemable, not redeemed, released, transferred or otherwise disposed of, the title whereto shall remain in this State till such sale as is hereinafter mentioned be made, shall by proceedings in the circuit court of the county in which the lands, or a part thereof, are situated, be sold to the highest bidder."

In the case of *State* v. *Farmers Coal Co.*, 130 W. Va. 1, 43 S. E. 625, Chapter 140, Acts of the Legislature, 1945, was held unconstitutional on the ground that it sought to make subject to sale lands which had not become irredeemable. The Court held that Section 4 of Article XIII inhibits the sale of any lands other than those to which the State has absolute title.

Section 5 of Article XIII of the Constitution of West Virginia provides as follows:

> "The former owner of any such land, shall be entitled to receive the excess of the sum for which the land may be sold over the taxes charged and chargeable thereon, or which, if the land had not been forfeited, would have been charged or chargeable thereon, since the formation of this State, with interest at the rate of twelve per centum per annum, and the costs of the proceedings, if his claim be filed in the circuit court that decrees the sale, within two years thereafter."

Appellants assert that the right to surplus proceeds of sale accorded by Section 5 of Article XIII is an outstanding equity in the land, and, therefore, the State can never ac-

BLEED THROUGH—POOR COPY

quire absolute title, as is required by Section 4 of Article XIII, to land sold for taxes or forfeited for nonentry for taxation. Appellants are thus in the inevitable position of asserting that although the Constitution requires the sale of lands for the benefit of the school fund, it, at the same time, inhibits and precludes any and all sales of lands for the benefit of the school fund; and they also, by necessary implication, assert that all sales made by the State since the year 1872 were null, void, and of no effect.

We submit that it is utterly clear that the above described right to surplus proceeds of sale is not an equity in the muniments of title to lands sold to the State for taxes or forfeited to the State for nonentry for taxation. The above described right to surplus proceeds of sale is an inchoate right in personalty. As stated in point 2 of the syllabus in *Wiant* v. *Hays*, 38 W. Va. 681 18 S. E. 807:

> "The right of the former owner to the excess of the proceeds of the sale of such forfeited land, after payment of taxes, interest, and costs, accorded to him by section 5, art. XIII of the constitution, is property in the former owner—personal property—which he may sell, and which is liable to the lien of a *fieri facias* against him, and such property as that, if a transfer be made of it in fraud of creditors, they may maintain a suit in equity to avoid the transfer."

This right has no relation whatever to the title to lands sold to the State or forfeited to the State and become the absolute property of the State. The Supreme Court of Appeals of West Virginia, therefore, did not err in holding that the State may acquire absolute title to lands sold or forfeited pursuant to the provisions of Chapter 160.

It is, therefore, submitted that the stated ground of jurisdiction that Chapter 160 violates the Fourteenth Amendment to the Constitution of the United States, in that it pro

vides that the State may acquire absolute title to lands sold for taxes or forfeited for nonentry for taxation, is without basis and does not present a substantial federal question.

Conclusion

We submit that the record made in this case presents no single substantial federal question, and, therefore, respectfully ask that the Court affirm the judgment below or dismiss the appeal.

Respectfully submitted,

IRA J. PARTLOW,
Attorney General of the State of West Virginia;

WILLIAM C. MARLAND,
Assistant Attorney General of the State of West Virginia;

JOHN C. VANCE,
Special Assistant Attorney General of the State of West Virginia;
Counsel for Appellee

BLEED THROUGH—POOR COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 326

JERRY M. GRAY, ET AL.,

Appellants,

vs.

THE STATE OF WEST VIRGINIA,

Appellee

MOTION OF THE STATE OF WEST VIRGINIA TO AFFIRM THE JUDGMENT BELOW OR DISMISS THE APPEAL IN THE ABOVE ENTITLED CAUSE

Comes now the State of West Virginia, by the Attorney General of West Virginia, and moves the Court to dismiss the appeal or affirm the judgment below on the ground that the record made in this case presents no substantial Federal question for the following assigned reasons.

I

The ground of jurisdiction as stated by appellants which relates to an alleged violation of the Fourteenth Amendment of the Constitution of the United States, in that appellants

were denied an opportunity in a judicial proceeding to contest the validity of the State's title to the lands included in this suit and sought to be sold in the names of appellants as former owners, is improperly asserted since as appears from the record made in this case appellants were served by publication and made a general appearance thereby waiving service of process.

II

The ground of jurisdiction as stated by appellants which relates to an alleged violation of the obligation of contract in contravention of Section 10 of Article I of the Constitution of the United States, is improperly asserted in that the facts and record made in this case present no contract.

III

The ground of jurisdiction as stated by appellants which relates to an alleged violation of an alleged contract or compact between the Commonwealth of Virginia and the State of West Virginia, is improperly asserted since the alleged contract or compact does not impose any limitation or restriction on the taxing power of the State of West Virginia.

IV

The right to surplus proceeds of sale accorded by Section 5 of Article XIII of the Constitution of West Virginia is not a vested right in the title to lands sold to the State for taxes or forfeited for non-entry for taxation and the acquisition by the State of absolute title to lands sold for taxes or forfeited for non-entry for taxation does not deprive the former owners of any property rights protected by the

BLEED THROUGH—POOR COPY

Fourteenth Amendment to the Constitution of the United States.

IRA J. PARTLOW,
Attorney General of the State of West Virginia;
WILLIAM C. MARLAND,
Assistant Attorney General of the State of West Virginia;
JOHN C. VANCE,
Special Assistant Attorney General of the State of West Virginia;
Counsel for Appellee.

(4371)

BLEED THROUGH-POOR COPY

No. 326. GRAY ET AL. *v.* WEST VIRGINIA. Appeal from the Supreme Court of Appeals of West Virginia. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Brooks B. Callaghan, Clarence E. Martin, Jr.* and *Clarence E. Martin* for appellants. *Ira J. Partlow,* Attorney General of West Virginia, and *William C. Marland,* Assistant Attorney General, for appellee. Reported below: 132 W. Va. —, 52 S. E. 2d 759.